A DIGEST

OF THE

DECISIONS OF THE SUPREME COURT

SITTING AT COLOMBO,

Since the Promulgation of the Charter

OF

MDCCCXXXIII.

EDITED BY

OWEN W. C. MORGAN, Esq.,

ADVOCATE.

COLOMBO,

1857.

ADVERTISEMENT.

THE following pages are intended to form part of a larger work, comprising all the decisions of the Supreme Court from 1833 to the present time. The rest of the work, a considerable portion of which is already in manuscript, will be published in similar parts, should the sale of the present part be attended with satisfactory results. A full Index will also be prepared, as soon as there is a sufficient number of parts to make up a volume.

C. A. L.

COLOMBO, AUGUST 10, 1857.

EXPLANATION OF ABBREVIATIONS USED IN THE PRESENT NUMBER.

M.—The Hon'ble Sir CHARLES MARSHALL, Knt., *Chief Justice.*

R.—The Hon'ble W. ROUGH, Esq., Sergeant at Law, *Senior Puisne Justice*, (appointed *Chief Justice*, Oct. 12, 1836.)

N.—The Hon'ble WILLIAM NORRIS, Esq., *Second Puisne Justice*, (appointed *Chief Justice*, Mar. 30, 1836.)

C.—The Hon'ble WILLIAM OGLE CARR, Esq., *Second Puisne Justice*, (appointed Apr. 9, 1836.)

St.—The Hon'ble JOHN FREDERICK STODDART, Esq., *Second Puisne Justice*, (appointed Oct. 12, 1836.)

J.—The Hon'ble JOHN JEREMIE, Esq., *Senior Puisne Justice*, (appointed Dec. 31, 1836.)

Coll.—The three Judges at Collective Sittings.

Jud. Com.—The Court of the Judicial Commissioner.

Gov. Ag.—The Court of the Government Agent.

S. M.—The Sitting Magistrate's Court.

Prov. C.—The Provincial Court.

D. C.—The District Court.

A
DIGEST
OF THE
DECISIONS OF THE SUPREME COURT SITTING AT COLOMBO,
SINCE THE PROMULGATION OF THE CHARTER OF 1833.

PART I.—From October 1833 to May 1837,

Edited by Owen W. C. Morgan,

Advocate.

PART II.—From June 1837 to December 1838,

Edited by W. M. Conderlag,

Proctor of the District Court of Colombo,

and

PART III.—From January 1839 to December 1842,

With a copious Index to the whole work.

Edited by Wm. Michael Beling.

Proctor of the District Court of Badulla.

COLOMBO,

Preface.

The following pages which together with Mr. Advocate Owen Morgan's Digest from October 1833 to May 1837 will form a complete Digest from 1833 to 1842, are offered to the Profession as a prelude to other volumes, containing the remaining Decisions of the Civil, and also others from the Tuesday and Collective Minutes; all of which are now in Manuscript and ready for the Press.

To facilitate reference to the whole work numbers of the pages and paragraphs of Morgan's Digest have been continued, and a copious Index has been annexed.

It may be necessary to observe, that the facts of the cases heard and determined in Appeal are, with some exceptions, imperfectly recorded in the Minutes of the Supreme Court; and I doubt not that those who are in the habit of making reference to them will bear out the assertion. This circumstance, coupled with my comparative inexperience in the work, will I trust atone for the defects and errors which the reader may discover in the following pages, and which would probably have been more numerous but for the kind and invaluable assistance rendered me by Mr. Advocate Lorenz, to whom I take this opportunity of returning my acknowledgments.

I think it also right to state that as the first portion of this volume, from June 1837 to December 1838, edited by Mr. Conderlag, had been very kindly placed at my disposal, I have availed myself of it to advantage.

In my acknowledgments of the assistance rendered me by friends to further this volume, I am bound to offer my thanks to Mr. J. E. VanderStraaten of the Registrar's Office, who has spared no pains to afford me every facility to have access to the Minutes of the Supreme Court.

Wm. Michael Beling.

Colombo.
Small Pass 21st, October 1862.

Table of Abbreviations.

R.—The Hon'ble W. ROUGH, Esquire., *Serjeant-at-Law, Chief Justice*, October 12th 1836.

J.—The Hon'ble JOHN JEREMIE, Esquire., *Senior Puisne Justice*, (appointed *Chief Justice* May 23rd 1838.)

St.—The Hon'ble JOHN FREDERICK STODDART, Esquire., *Second Puisne Justice* (appointed *Senior Puisne Justice*, May 23rd 1838.)

C.—The Hon'ble WILLIAM OGLE CARR, Esquire., *Second Puisne Justice*, (appointed *Senior Puisne Justice*, February 1st 1840.)

O.—The Hon'ble SIR ANTHONY OLIPHANT, Knight, *Chief Justice*, May 1st 1839.

H.—The Hon'ble JOHN GODFRIED HILLEBRAND, Esquire., *Second Puisne Justice*, November 23rd 1839.

S.—The Hon'ble JAMES STARK, Esquire., *Second Puisne Justice*, April 7th 1841.

Coll.—Collective Sittings.
S. C.—Supreme Court.
D. C.—District Court.
D. J.—District Judge.
Par:—Paragraph.

Errata.

[N. B.—A few sheets of this work having run short they were subsequently re-printed; and consequently some of the following errors which occur in the sheets of the first issue, were corrected in those that were re-printed.]

Abbreviations.

[*f. n. foot note. m. n. marginal note.*]

PAGE.	LINE.		
172	22		*for* "he" *read* be.
179	25		*for* "and" *read* or.
182	20		*for* "regulation" *read* resolution.
182	42	(*f. n.*)	*for* "Ante p. 52 by 223" *read* Vide Morgan's Digest p. 52 par. 223.
183	16		*for* "23" *read* 523.
184	41	(*f. n.*)	*for* "See infra Dec. 20, 1837" *read* Vide post p. 201 par. 542.
185	35		*for* "256" *read* 526.
185	43		*for* "Vide *infra* October 18, 1839," *read* Vide post p. 199 par 538.
186	10		*for* "257" *read* 527.
186	17		*for* "258" *read* 528.
187	3		*for* "259" *read* 529.
188	2		*for* "260" *read* 530.
192	32		before names of parties *insert* 531.
193	12		before names of parties *insert* 532.
193	19		before names of parties *insert* 533.
194	25		before names of parties *insert* 534.
194	34		before names of parties *insert* 535.
195	2		before names of parties *insert* 536.
195	16		before names of parties *insert* 537.
202	6		*dele* "and"
211	38		*for* "504" *read* 550.
211	39		*for* "ante p. 137" *read* in Morgan's Digest p. 137 par 463.
211	5	(*m. n.*)	*for* "marg. notes p. 137" *read* Morgan's Digest p. 137 par 463.
214	3		*for* "505 *read* 551.
217	37		*for* "556" *read* 555.
218	36		*for* "559" *read* 556,
222	—	(*f. n.*)	*for* "See infra" *read* Vide post p. 225 par 559.
223	4		*for* "Ante p. 107" *read* in Morgan's Digest p. 107 par 427.
225	12		*for* "jurisdiction cases" *read* jurisdiction over cases.
225	37		*for* "See ante p. 218" *read* See ante p. 218 par. 556.
225	4	(*m. n.*)	*for* "ante p. 218" *read* Ante p. 218 par. 556.
235	—	(*top*)	"1883" *read* 1838.

Line.		
18	(*m. n.*)	*for* "a" *read* at.
7		*for* "ante p. 154" *read* Morgan's Digest p. 154 par 488.
30		*for* "enferred" *read* referred.
6		*for* "destination" *read* description.
26		*for* "while" *read* which.
4	(*m. n.*)	*for* "or" *read* to.
18	(*m. n.*)	*for* "regular" *read* irregular
13		*for* "Proctors" *read* Proctor's.
1		*dele* "of."
3		*for* "Ther" *read* The.
6	(*m. n.*)	after "their" *insert* claims.
7	(*m. n.*)	*dele* "claims."

A DIGEST

OF THE

DECISIONS OF THE SUPREME COURT,

SITTING AT COLOMBO,

Since the Promulgation of the Charter of 1833.

1833, *October* 9. 1833.

Kandian Law—Transfer—Consent of son.

1.—By the Kandian Law, the consent of the Son is not necessary to enable the Father to dispose of his property in order to obtain assistance and support. Such a requirement would not only be unreasonable itself, but is at variance with the general rules of the Kandian Law, and opposed to numerous decisions.—No. 4380, Jud. Com. *Kandy*, (M.)

Kandian Law—Transfer to procure support

2.—In a case between Kandian parties, where a person had transferred certain lands to enable him to procure support; *Held*, that even if the deed of transfer should turn out to be invalid as an absolute transfer, it should at least be considered that the transferee had a virtual mortgage on the lands for any expense which he might have actually been put to for the support of the transferor or the payment of his debts; and therefore that he had a right to hold the lands as a security for repayment.—*Ibid.*

Oct. 12. (M. R. N.)

Crown—Confiscation.

3.—The British Government cannot restore property which, though confiscated by the King of Kandy, had already been alienated by grant of the King: for the Act of Restoration could only operate on property which still belonged to the Crown as successor to the rights of the Kandian King.—No. 5344, Jud. Com. *Kandy*, (Coll.)

Oct. 21.

Ejectment—Title.

4.—A party who claims property must gain by the strength of his own title, and not on the weakness of that of the adverse party.—No. 6284, Gov. Ag. *Ratnapoora*, (M.)

1833.

Oct. 25.

Prescription—Possession under Mortgage.

5.—Possession under a mortgage or temporary transfer gives no right of Prescription. This right can only be acquired by an occupation adverse to or at least independent of the claimant. Supposing it to be an ordinary mortgage, the mortgagor has a right at any time to recover possession by repayment. If however the mortgage—bond has fixed a limited period for redemption, at the expiration of which therefore the power of redemption would be gone, that would furnish a substantial ground of defence.—No. 1814, Gov. Ag. *Kandy*, (M.)

Oct. 26, (M. R. N.)

Custom.

6.—The Supreme Court expressed its unwillingness to disturb a judgment founded on an alleged custom, with which a District Court and Assessors must be much more conversant than those who do not possess the same advantages of local knowledge and experience.—No. 1554, Gov. Ag. *Allipoot.*

Condition executory.

7.—Where a deed in favour of the plaintiff was granted on a specific condition, not executed, but executory; *Held*, that a failure in the performance of such condition would defeat the instrument; and that it would be for the plaintiff to shew a real *bona fide* performance of the condition.—No. 1622, Gov. Ag. *Seven Korles.*

Kandian Law—Succession.

8.—As regards Succession by the Kandian Law, the weight of authority founded both upon opinion and precedent is in favour of the rule—that the property of a person who dies leaving issue by two wives, should be divided amongst all his children equally: and this practice would seem to be more consonant with the principles of equitable distribution.—No. 6754, Gov. Ag. *Ratnapoora.*

Kandian Law—Rights of a Widow.

9.—By the Kandian Law, a Widow has a life-interest in the estate of her deceased husband; and is supposed to have the chief superintendence and control of the whole estate for life.—No. 7044, Gov. Ag. *Ratnapoora.*

Oct. 30.

10.—Where a matter has been referred to Arbitrators appointed by the parties, and an umpire selected by the Court, the award of the majority of them should be considered final, unless strong grounds can be shewn for doubting the propriety of it.—No. 4462, Jud. Com. *Kandy*, (M.) Arbitration.

11.—Where a party has taken a vexatious or improper appeal through a Proctor, the Proctor ought to be ordered to pay any costs which may have been incurred on either side in consequence of such Appeal.—No. 13236, D. C. *Negombo*, (M.) Vexatious Appeal—Costs.

12.—The Reg. No. 4 of 1817, (concerning Frauds and Perjuries,) is no bar to an action unless specially pleaded.—No. 3117, S. M. *Calpentyn*, (N.) Frauds and Perjuries.

Nov. 1.

13.—Where a woman had married in *Deega*, and having subsequently been obliged to return to her *Deega* Village, had died there ; *Held* that though on her return she was entitled to support and assistance from her half-brother, the defendant, (and this whether the father had enjoined it on him or not,) yet that, at her death, all claim upon the paternal property was at an end ; and that her son, (who had settled in his father's Village and inherited his lands,) could have no claim against the defendant.—No. 5137, Jud. Com. *Kandy*, (M.) Marriage in *Deega*—Inheritance.

14.—No Prescription runs against the Crown, either as regards its general prerogatives, or as respects the Kandian Proclamation of Prescription.—No. 6418, Gov. Ag. *Ratnapoora*, (M.) Prescription—Crown.

Nov. 2, (M. R.)

15.—Where a party has admitted an instrument at the trial, he cannot be allowed after the decision of the case to retract such admission as a mode of obtaining a new trial, unless it can be shewn that he had been imposed upon—a supposition which would be negatived by the circumstance of the admission having been made in open Court.—No. 5080, Jud. Com. *Kandy*, (M.) Admission—Retraction of.

Acknowledgment of Trust.

16.—Where a party, previous to his death, had enjoined his wife to give up certain lands to the plaintiff, on receiving a certain sum of money as indemnity for expenses ; *Held*, that such an injunction would be an acknowledgment that the deceased had held the lands only in trust for the plaintiff.—No. 4901, Jud. Com. *Kandy*, (M.)

Nov. 18.

False Evidence —New Trial.

17.—The naked assertion in a Petition of Appeal that witnesses have sworn falsely is no ground for a New Trial.—No. 4489, Jud. Com. *Kandy*, (M.)

Nov. 19.

Bond—Prescription.

18.—An instrument, which though inconsequentially termed a Bond (for in words there is no magic,) is but a mere acknowledgment of a certain sum of money lent and advanced, to be recovered from the debtor personally, upon a condition, is no actual Bond, and does not require ten years to be prescribed.—No. 1315, S. M. *Galle*, (R.)

Nov. 20.

Prescription.

19.—The Reg. No. 13 of 1822, (concerning Prescription) is not available as a ground of defence, unless specially pleaded.—No. 14532, S. M. *Caltura*, (N.)

Decree—Force of.

20.—The Supreme Court ordered that the decree pronounced in a certain case should be limited to dismissing the plaintiff's suit, without confirming the defendants in their possession of the land in dispute. *Per* Marshall, C. J.—" As the decree now stands, other parties might be excluded, having preferable claims to that of the defendant. And by this means a fictitious suit brought by the friend of a person possessing land without a title to it, might be made to operate in favour of such possessor against the rightful owner."—No. 885, Gov. Ag. *Kornegalle*, (M.)

Kandian widow —Gift to.

21.—The circumstances under which a party, a Kandian woman, had been put in possession of certain lands by her brother, were held to warrant the supposition that he had never intended that

she should be turned out of possession during her life. Her state of destitution after her first husband's death gave her a legal claim upon her brother for assistance; and her receiving a second husband at his hands was a natural and sufficient consideration for the gift of the land to her, at least for her life.—No. 6332, Gov. Ag. *Kornegalle*, (M.)

Prescription—Possession under Mortgage.

22.—Possession by virtue of a Mortgage can give no prescriptive right; the contract being always determinable at the will of the Mortgagor.—No. 5401, Jud. Com. *Kandy*, (M.)

Disinherison by deed.

23.—A deed disinheriting the Heir at Law ought to be proved beyond the possibility of a doubt or suspicion. The not calling the writer of such a deed, without accounting for the omission by death or other uncontrolable circumstance, has in itself a suspicious appearance, especially where the names of the witnesses are (as frequently happens) not signed by themselves, but inserted in the body of the instrument by their assent.—No. 8736, Gov. Ag. *Kornegalle*, (M.)

Nov. 21.

Right to adduce evidence.

24.—However improbable it may be that a plaintiff should be able to disprove the defendant's case, still he ought to have an opportunity of doing so, if by possibility he should be able, *ex. gr.*, to prove that a deed produced by the defendant is a forgery, or to show a decree of a Gansabe, which would have the effect of destroying the defendant's title by prescription.—No. 5229, Jud. Com. *Kandy*, (M.)

Nov. 22.

Proof of Gift and Possession.

25.—A Gift loosely proved, followed by partial possession, and rare exercise of ownership, is not sufficient to justify a decree in favour of the donee.—*Manabodde* v. *Marianatchy*, Gov. Ag. *Matelle*, (R.)

Witnesses to a deed.

Writer.

26.—Where the names of the witnesses appear to have been inserted in a deed (in the then usual manner) without any actual signature by themselves; *Held*, that the *writer* of the deed was

a very material witness, and ought to have been called.—No. 349, Gov. Ag. *Maturatte*, (M.)

Witnesses—Acquittal from Perjury.

27.—It by no means follows, because the witnesses for the Appellant were acquitted of Perjury, that therefore their statement was true, or that the evidence adduced by the Respondent was false.—No. 412, Gov. Ag. *Maturatte*, (M.)

Proof of deed—Material evidence.

28.—If the witnesses or the writer of a deed were alive, the not calling them necessarily wears a suspicious appearance. Where however the evidence was quite sufficient, without the assistance of the deed, the decree was affirmed.—No. 6785, Gov. Ag. *Ratnapoora*, (M.)

Nov. 23, (M. R. N.)

Gansabe—Award of.

29.—The validity of the Award of a Gansabe does not depend on the obedience the defendant has paid to it. A Gansabe may not have the power of enforcing its decrees, but that ought not to prejudice a claim made and established before it.—No. 8450, Gov. Ag. *Kornegalle*, (M.)

Interruption of Prescription.

30.—A claim before a Gansabe is a sufficient interruption of prescription.—*Ibid.*

Frauds and Perjuries.

31.—The Proclamation enacting that no transfer of land shall be good unless attested by two witnesses, must be taken with reference to the party taking the objection. Where the transferor avows the deed, a third party cannot take the objection.—No. 416, Gov. Ag. *Kornegalle.*

Disinherison—Kandian Law.

32.—Authorities appear to be conflicting as to the abstract right, by the Kandian Law, of an owner of land to leave it away from his heirs at law. The balance of those authorities would appear to be in favour of that right.—*Ibid.*

Partnership—Evidence of.

33.—To make a party liable as a Partner, it is not necessary to have proof of a real and *bona fide* partnership either by deed or otherwise. If a person holds himself out to the world as the partner of another, whether by express words or by the general tenor of dealings, he is liable for the debts of his ostensible partner.—No. 6070, Jud. Com. *Kandy*, (M.)

34.—Though a Bond for the value of goods sold was given by A, alone, it does not thereby follow that the vendor thereby intended to look to him alone for payment, or that, even if such had been his intention, he would not be entitled to pursue his remedy against a partner B, if it ultimately appeared that the latter was disposing of the goods purchased, as partnership property.—*Ibid.* Bond by one Partner.

Nov. 25.

35.—A District Judge has no right to impose a fine upon a party, unless for conduct involving some specific offence, such as perjury, subornation, or other species of fraud, which would be cognizable as a criminal offence.—No. 767, Gov. Ag. *Ruanwelle,* (M.) Fining a party to a suit.

Nov. 26.

36.—A former decision, if not between the same parties nominally, however identical their interests may be in reality, will not prevent evidence being gone into in a subsequent suit as to the respective rights of the parties.—*Semiral* v. *Welligalle,* Gov. Ag. *Matelle,* (M.) *Res Judicata.*

37.—A Donation in consideration of assistance to be rendered to the Donor, is by the Kandian Law revocable, subject in certain cases to compensation for assistance actually rendered.—*Dodandenia* v. *Koomare,* Gov. Ag. *Matelle,* (M.) Donation—Kandian Law.

38.—Judgment cannot be given for more than is claimed.—No. 1890, Gov. Ag. *Ruanwelle,* (M.) Judgment.

Nov. 27.

39.—The Reg. No. 13 of 1822, (concerning Prescription) is no bar to a claim, unless specially pleaded.—*Dewadure* v. *Allehakoon,* S. M. *Ballepittimodera,* (N.) Prescription.

Nov. 28.

40.—Where a party had left the country and died in a foreign district, and the defendant had during his absence performed *rajekaria* in respect of certain lands mortgaged to him by such party; *Held,* 1. that the performance of this duty did not in effect give any legal title; and 2. that such Performance of *Rajekaria.*

Absence. performance could not be considered as an argument against the supposition that the defendant had held in the character of mortgagee, for such an argument could only have force where the alleged mortgagor had been present and could perform it himself. The possession of the defendant, being thus reduced to that of a mortgagee, was not such as to convey a legal title by prescription.—*Oeka* v. *Mabokka*, Gov. Ag. *Matelle*, (M.)

Prescription.

Appeal—Revision. 41.—In Appeal, the case should be considered open to revision on both sides; and the Supreme Court is bound to make any amendment which Justice seems to require, though not asked for by the party for whose benefit it is made.—No. 192, Gov. Ag. *Maturatte*, (M.)

Nov. 30, (M. R. N.)

Penal Law. 42.—The Proclamation of 14. January 1826 is a penal proclamation, and ought to be construed strictly. Before therefore a decree of Confiscation can be allowed to operate against a party, it must appear beyond all doubt that he himself has been personally concerned in a fictitious transfer of land for the purpose of evading the tax or duty on the land.—No. 552, Gov. Ag. *Maddewelletenne*, (M.)

Confiscation.

Children—Shares of. 43.—The fact of a mother having given either money or land to all her children except one, (to whom she had agreed to surrender her rights, provided he should succeed in obtaining the restoration of certain property from the king of Kandy,) was held to be a strong circumstance to shew that she considered him provided for by the land which he had recovered.—No. 379, Gov. Ag. *Madewelletenne*, (M.)

Remuneration—Revenue paddy. 44.—The 29th clause of the Proclamation of 21. November 1818, gives the inferior Chiefs an absolute right in a twentieth share of Revenue Paddy as compensation for services; but this right, like every other claim for remuneration, can only be supported by first showing that the services have been duly and faithfully performed.—No. 1386, Gov. Ag. *Kornegalle*, (M.)

December 2, (M. R. N.)

45.—Where no reason is shewn in the Petition of Appeal or at the hearing why any fresh evidence which the appellant proposes to adduce might not have been brought forward in the first instance, he is not entitled to a New Trial.—No. 9414, D. C. *Seven Korles*, (M.) **Fresh Evidence—New Trial.**

46.—Where certain lands, which had been erroneously exempted from Government dues, as the property of a Chief or Headman, under cl. 23 of the Proclamation No. 21 of 1818, were in 1831 discovered not to be liable to the duty from which they had been exempted, and were accordingly transferred to the Commutation Registry as Temple land; *Held* 1, that the period from which alone the term of prescription as regards the claim of the Temple would begin to run, was the 31st January 1831, when the lands were for the first time entered in the Registry: and 2, that the former supposed proprietor could in such a case no more claim a prescriptive right of exemption from Temple-duty than a tenant holding land on rent (the parveny right to which should be discovered to be in a different person from him from whom the tenant had first received the land,) could obtain a prescriptive right to hold on without payment of rent to his new landlord.—*Gonegodde* v. *Waharakgodde*, Jud. Com. *Kandy*, (M.) **Prescription—Government & Temple-duty.** **Landlord and Tenant.**

47.—The Supreme Court modified a Decree by simply dismissing the plaintiff's claim with costs: and *per* Marshall, C. J.—" The evidence is scarcely strong enough in favour of the defendant to warrant a decree in favour of the defendant's mother,—a decree which might possibly preclude the rights of third persons having preferable claims to either of the parties in the present suit." —No. 661, Gov. Ag. *Madewelletenne*. **Decree—Third parties.**

Dec. 4, (M. R.)

48.—The omission of a land in the *Devale* Registry is not sufficient to deprive the lawful owner of his right.—No. 1096, Gov. Ag. *Kornegalle*, (M.) **Registry of Lands.**

Possession—*Prima-facie* case.

49.—"The evidence is much too loose and contradictory on the plaintiff's side to warrant the Court in disturbing the defendant's possession, which has existed for several years, though not long enough perhaps to give him an absolute title by prescription."—No. 352, Gov. Ag. *Maturatte*, (M.)

Dec. 6, (M. R.)

Evidence—Notes of.

50.—Where the evidence of the witnesses examined by the Court below did not appear in the notes annexed to the proceedings, (the result only of the evidence being mentioned by the Judge,) the Supreme Court remanded the case to the District Court with request to the Judge to hear evidence again on both sides.—No. 2816, S. M. *Belligam*, (R.)

Possession under Mortgage.

Prescription.

51.—"If the defendant's possession rests on a mortgage granted by the plaintiff, this would not give a title of prescription. And if, as alleged by the plaintiff, her son has performed *rajekaria* for the last 8 years, this would go a great way towards repelling a title by prescription."—No. 250, Gov. Ag. *Madewelletenne*, (M.)

Gansabe—Award of.

52.—The award of a Gansabe does not bind a party, unless it appears that he had made an agreement to refer the matter to the arbitration of that species of tribunal.—No. 5173, Jud. Com. *Kandy*.

Dec. 7, (M. R.)

Res Judicata.

53.—Where a suit has been dismissed, and no legal reversal has taken place, it must be considered conclusive and final between the parties. —No. 6277, Gov. Ag. *Kornegalle*, (M.)

Separation.

Wife's debts.

54.—When a Separation has been entered into between a Husband and Wife with judicial sanction, it should be adhered to on the one side as as well as on the other; and if the Wife has contracted debts, she, and not the Husband, ought to be responsible. Those therefore who give credit to a woman under such circumstances know or ought to know that their claim against the Husband is at best a doubtful one; and it is

their duty to enquire of the Husband whether, if they trust the Wife, they may do it with his consent and on his responsibility.—No. 4569, Jud. Com. *Kandy*, (M.)

Dec. 9, (M. R. N.)

Stamp on an Instrument having two-fold operation.

55.—Where an instrument has a two-fold operation, and the stamp is sufficient to protect one of the objects which it contemplates, it may stand good for so much as is protected by the Stamp. Where an instrument on which an action was brought was on the one hand obligatory on the wife's relatives for the *Kaykoolie*, and on the other hand binding on the Husband towards his Wife for the *Magger*, and it was only in the former of these characters it was sought to be put in force ; *Held* that the instrument having a Stamp sufficient to cover the amount of the *Kaykoolie*—though insufficient as regards the *Kaykoolie* and *Magger* taken together—was admissible in evidence.—No. 6814, Prov. C. *Jaffna*, (M.)

Cross-action—Reconvention.

56.—A decree condemning the defendant was affirmed,—" reserving however to the defendant the right to sue the plaintiff for the value of the 23 star-pagodas alleged to have been paid by him, and also the value of any cloth which he could prove to have been damaged when received from the plaintiff; provided that he the defendant should establish to the satisfaction of the District Court that the evidence in support of such counter-claim was not within his reach at the previous trial."—No. 5899, Jud. Com. *Kandy*, (M.)

Dec. 12.

Penalty—Proof.

57.—On a prosecution founded on certain conditions of Sale, imposing a fine on the renter, if he should sell arrack at any other than the fixed tavern, *Held* that the terms of the prohibition should be clearly proved to have been broken, before the penalty could be awarded: and that the mere possession of the arrack, without proof of its sale, was insufficient.—No. 1871, Prov. C. *Jaffna*, (M.)

Dec. 14, (M. R. N.)

Credit due to Witnesses.

58.—On a point which depends on the credit due to Witnesses, it is always safer to adopt the opinion of the Court before whom the witnesses have been examined, than that of a Court to whom their statements have merely been read over.—No. 6347, Gov. Ag. *Kornegalle*, (M.)

Dec. 16.

Government Grant—Conditions—Fulfilment of. Alienation.

59.—Where Lands had been granted by Government under the condition that the grantee, his heirs, &c. should not alienate or assign them, without the consent of Government, until the whole should have been brought into cultivation, which, by a previous condition, was to be fulfilled within 3 years; *Held* 1, that it was to be presumed, after the lapse of 13 years, that the conditions had been duly fulfilled; and 2, that a sale in execution was not an alienation by the grantee. —No. 7999, D. C. *Negombo*, (M.)

Sale in Execution.

60.—A Sale in Execution is an assignment by operation of Law, and the purchaser must take the property subject to the same conditions and liable to the same forfeitures as it was subject and liable to in the hands of the original owner. —*Ibid.*

Novation—Bond—Bill of Exchange.

61.—Though it could not be ascertained whether a Bond in question had been given before or after an alleged Bill of Exchange; *Held* that the plaintiff had nevertheless a right to recover upon the higher instrument, which had never been cancelled.—No. 6854, Prov. C. *Jaffna*, (R.)

1834, *February* 3.

1834.

62.—A Buddhist Priest is incapable, on account of his priesthood, of possessing land (or of acquiring a prescriptive right thereto,) unless in trust for some Temple—*i. e.* a *Wihare,* not a mere *Pansellate* living.—No. 5980, Jud. Ag. *Ratnapoora,* (M.) Buddhist Priest —Property.

Feb. 5.

63.—Marriage in *Deega* divests the wife of all right of inheritance to the property of her parents. —No. 6939, D. C. *Ratnapoora,* (M.) Marriage in *Deega.*

Feb. 6.

64.—When one party has a bill of sale in his name, he is to be considered *prima facie* the owner of the property, and it is for the opposite party to shew that he is not, rather than for the plaintiff to be called on to prove that he is, the owner.—No. 3470, D. C. *Pantura,* (M.) *Prima-facie* title.

April 2, (M. R. N.)

65.—Payment to the defendant's Accountant is in point of Law payment to the defendant, and the plaintiff is relieved from further proof.—No. 13046, D. C. *Negombo,* (M.) Payment—Agent.

66.—The foundation of the plea of Prescription, as regards alleged debts, is the presumption of payment which the Law raises after a certain lapse of time; and which presumption is always subject to be repelled by any promise of payment or other act by the defendant inconsistent with the idea of payment, within the time prescribed. —No. 14025, D. C. *Galle,* (M.) Prescription.

April 30, (M. R. N.)

67.—Where the cause of action arose within the District, the plaintiff is equally entitled to sue in the Court of that district, as if the defendant were resident within that district.—No. 2099, D. C. *Jaffna,* (M.) Jurisdiction.

Notice—Service of.

68.—Leaving a Notice of Trial at the last place of abode of the defendant, is sufficient service; and the Court may proceed to hear the case *ex parte.*—No. 1497, D. C. *Colombo*, (M.)

Regulation of Frauds.

Guarantee.

69.—The Reg. No. 4 of 1817, (concerning Frauds and Perjuries) is intended to prevent creditors from fixing debts, which they consider desperate as regards their original debtors, on solvent persons, unless the guarantee of such solvent persons has been reduced to writing. Where at a sale of goods by the plaintiff to the defendant, the latter had given an undertaking (not in writing) to pay the value thereof to N. C. a third party, to whom the plaintiff was indebted; *Held* that this was only a *mode* of payment; and that though the Reg. would have been a bar to an action by N. C. against the defendant upon such unwritten undertaking, it was no answer to an action by the plaintiff against the defendant for the value of the goods.—No. 11850, D. C. *Colombo*, (M.)

Decree—Contempt.

70.—If property already decided by both Courts to belong to the plaintiff should be again claimed by the defendant, or by any person acting in his behalf, such claim must necessarily be considered a contempt both of the Supreme Court and of the Court below.—No. 12029, D. C. *Colombo*, (M.)

May 3, (M. R. N.)

Attempt—Intention.

71.—The mere *intention* to land cargo does not amount to an *attempt* at landing under the Reg. (No. 9 of 1825 ?—)—No. 2106, D. C. *Jaffnapatam*, (M.)

Confiscation—Fictitious Transfer.

72.—As to Confiscation under cl. 4 of the Procl. of 14th January 1826,—the former part of this clause contemplates a person (not the Headman) being concerned in the illegal transfer to the headman. And no prosecution can be sustained on the second part of this clause, without first shewing distinctly that the land belonged to some other person, and that the defendant as headman was concerned in taking the land upon the fictitious transfer.—*Govt.* v. *Mettewille Oyah*, Gov. Ag. *Matura*, (R.)

73.—A marriage in *Deega* does not divest the wife of her inheritance where she has always kept up a close connexion with her father's house; and this independantly of the state of destitution in which she may be, and which of itself would entitle her to some assistance from the estate of her deceased parents.—No. 690, D. C. *Madewelletenne*, (M.) Marriage in *Deega*.

74.—A District Judge may, if he entertains doubts of the safety of leaving an estate under the sole control of the Widow, join such other persons in the administration as may appear right and fitting to the District Court.—No. 1, D. C. *Amblangodde*, (M.) Administration to Widow.

May 14, (M. R. N.)

75.—Evidence given in one case is not, strictly speaking, admissible in another; every defendant having a right to hear the evidence of every witness adduced against him.—Nos. 1835, 6, 7, & 8, D. C. *Colombo*, (M.) Evidence in a former suit.

76.—A District Court is justified in dismissing a suit on the ground that the plaintiff had not taken Administration to the estate of the party under whom he claims.—No. 14333, D. C. *Caltura*, (M.) Administration—Want of—

77.—A plaintiff should be allowed to adduce evidence to take the case out of the scope of the Reg. (No. 13 of 1822, cl. 5), as for instance of part performance by the defendant within the term prescribed, payment of interest, acknowledgment of the debt being still due, or any other act or expression by the defendant within that period, which would rebut the presumption of payment on which the defence of prescription is founded.—No. 216, D. C. *Caltura*, (M.) Prescription.

78.—A Replication would be unnecessary, where a general denial has been entered. Though the 7th Rule makes no limitation of the right of reply, still a Replication, if utterly useless, may be rejected as irrelevant, under the 8th Rule.—No. 296, D. C. *Pantura*, (M.) Pleading—Replication.

May 17, (M. N.).

Marriage in *Beena*.

Rights of the Wife—Mistaken claim.

79.—Though a woman married in *Beena* may have mistaken the grounds of her right (viz. by inheritance), and rested her claim on a gift from her mother, there is no reason why that mistake should prevent her real claim from being enforced. —No. 706, D. C. *Kandy*, (M.)

May 21, (M. R. N.)

Marriage—not set aside.

80.—A marriage if not set aside in the life-time of the parties, cannot be afterwards interfered with or pronounced void.—No. 343, D. C. *Negombo*, (R.)

Pawn—Forfeiture of.

81.—The Reg. No. 6 of 1806, cl. 15, prohibits Pawning without the presence of a Police Officer; but does not declare that the owner of the goods shall lose all right to recover them back. A party infringing this provision, by pawning goods without the presence of the Officer, may render himself liable to punishment for that breach of the law; but is entitled to recover the goods on repayment.—No. 225, D. C. *Pantura*, (M.)

May 24, (M. R. N.)

Confiscation of Temple.

Gifts by Priest.

82.—The confiscation of a Temple and the consequent deprivation of the Priest being admitted; *Held* that such Priest had no legal power to transfer his rights over the Temple, until his restoration: and consequently that of all gifts whether verbal or by deed, made by him, that which purports to have been made immediately after such restoration is the only one which he was qualified or authorized to execute.—No. 523, Jud. Com. *Kandy*, (M.)

Government—Prejudice to.

83.—The probability of prejudice to Government is no reason why a Court should hesitate to do justice between parties.—*Gonigoda* v. *Waharakgoda*, Jud. Com. *Kandy*, (M.)

May 31, (M. R.)

Conditions of Sale.

84.—A condition that in the event of any profit arising from a resale, the purchaser (*i. e.* the person on whose default such resale takes place,) should not be entitled to such profit, though he would be liable for any deficiency, may be a very

hard condition: but still, if a party becomes a purchaser with the knowledge that such condition exists, or with the means of obtaining that knowledge, if he chooses to do so, he must be bound by it.—No. 857, Prov. C. *Jaffnapatam*, (M.)

June 4, (M. N.)

85.—Conditions entered into in respect of Government rent, form of themselves a contract merely between the Government and the Government-renters, and are not binding on third parties, unless adopted by them. Conditions—Third Parties.

Where such conditions had been adopted by the defendant, one of which was "to pay the one-tenth share according to Government condition," the plaintiff was *held* entitled to compensation, not merely according to the then value of paddy, but at the highest rate at which paddy had been sold at the place in question between the time of harvest and the time of actual payment. —No. 128, D. C. *Chavagacherry*, (M.) Compensation—Calculation of.

86.—Three Assessors were *held* absolutely indispensable to the existence of a District Court under the Charter.—No. 5159, D. C. *Badulla*, (M.) Assessors.

June 11, (M. R. N.)

87.—The Creditors of a deceased debtor are entitled to priority over his Heirs.—No. 14136, S. M. *Caltura*, (M.) Priority of Creditors.

88.—There is nothing illegal in a Proctor acting as a Fiscal's Deputy; though it would be well that he should not act in that double capacity, in a case in which he is concerned for one of the parties.—*Ibid.* Proctor—acting as Fiscal's Deputy.

89.—A Proctor is a competent witness for his client: and it is for the Court to say how far his credit is affected by the situation in which he stands towards the party.—*Ibid.* Proctor—a competent Witness.

July 2, (R. N.)

90.—A sentence once passed cannot be altered or interfered with, unless by consent of the parties or through appeal. The rule 38 (sec. 1 of the *Rules and Orders*) does perhaps carry the power Sentence—cannot be altered.

of District Courts beyond that which was formerly inherent, through the Government Proclamation of the 22. January 1801, in Sitting Magistrates and Provincial Courts; but it gives no authority to District Courts to amend their sentences given upon evidence offered and heard: and indeed it may be a question whether it really authorizes more than what was already authorized by cl. 29 of the Proclamation.—No. 238, D. C. *Chavagacherry*, (R.)

Relief.

91.—Relief in cases of manifest Mistake is of two kinds, Judicial or Sovereign. Judicial relief is granted in the Court itself in which the suit is depending; and hence it can amend error in pleading, admit further evidence, and do other passing acts, such as are provided for in cl. 23 of the Proclamation of the 22. January 1801. Sovereign relief is necessary in the resolution of contracts on the ground of Fraud, Fear, &c.; and this must be administered through appeal to a higher tribunal.—*Ibid.*

July 9, (R. N.)

Conflicting Evidence.

92.—In cases of conflicting evidence the Supreme Court is rarely disposed to question the judgment of the Court below as to the relative degrees of credit due to the Witnesses.—No. 21, D. C. *Walligame*, (N.)

July 23, (M. R. N.)

Pleading—Libel.

93.—The claim of the plaintiff should always appear at the commencement of the proceedings, either in the shape of a written libel, or of his distinct *viva voce* examination.—No. 7728, D. C. *Amblangodde*, (M.)

Stamp—"Money."

94.—A conviction for a breach of the Stamp Regulation (No. 4 of 1827,) was set aside on the ground that the Regulation only made it penal to take receipts for *Money* without stamp, but not receipts for other things.—No. 94, D. C. *Chavagacherry*, (M.)

July 30, (M. N.)

Reference to Arbitration.

95.—Where the Court below had referred a matter to Commissioners without any assent of the

parties either to the adoption of that course as a final mode of decision, or to the nomination of the two persons chosen; the Supreme Court ordered the case to be referred back that evidence might be taken on both sides on the points at issue.—"Where the parties bind themselves voluntarily to submit matters in dispute to arbitration and to abide by the award made, there can be no objection to this mode of deciding the case; but in the present instance the Court below merely delegated to other persons the duties which ought to have been performed by itself."—No. 91, D. C. *Tenmoratchy*, (M.) Assent of the Parties.

96.—The word "Nonsuit" is only applicable to the dismissal of the plaintiff's claim, and is never applied to a judgment given against a defendant. —No. 2989, D. C. *Galle*, (M.) Nonsuit.

August 6, (M. N.)

97.—If the plaintiff can prove that the money recovered against him by a third party had really been borrowed from that party by the defendant and not by himself, he (the plaintiff) would be entitled to recover it from the defendant as so much money paid by him to the use of the defendant. —No. 1430, S. M. *Pantura*, (M.) Money paid.

Aug. 13, (M. N.)

98.—A decree pronounced in favor of the plaintiff, in a former case, to which the defendant was no party, will not affect the defendant.—No. 3544, D. C. *Pantura*, (M.) Decree—Third party.

99.—A party, by demuring, objects that the facts alleged by the opposite side, supposing them to be true, would not establish his case; and therefore that there is no necessity for answering such allegations. A demurrer is wholly inapplicable to the state of pleading as it exists in this Island.—No. 130, D. C. *Pantura*, (M.) Demurrer.

Aug. 20, (M. N.)

100.—The institution of a suit in a wrong class under the table of Stamps, is not of itself a sufficient ground for dismissal; but the plaintiff ought rather to be called upon to supply the additonal stamps required.—No. 378, D. C. *Matura*, (N.) Stamp—Wrong class.

Aug. 27, (M. R. N.)

Frauds and Perjuries.

101.—On the 21st March 1832, the plaintiff addressed a letter to the defendant, offering him his gardens for sale for Rds. 800, and requesting him to get surveys prepared. On the 27th March the Surveyor made his surveys, in which the defendant was declared the purchaser, the plaintiff being present, stating that he had sold the gardens to the defendant, and desiring the Surveyor to insert the defendant's name in the survey; *Held* that the letter, and the acts of survey, coupled with the evidence of the Surveyor, amounted to a "contract in writing signed by a person lawfully authorized by the parties," under the Reg. No. 4 of 1817.—No. 109, D. C. *Caltura*, (M.)

"Contract in writing, signed, &c."

Stamp.

Agreement to Marry.

102.—The Stamp Ord. No. 4 of 1827, (Table E,) exempts "agreements and contracts to marry" from stamp-duty. *Held* 1, that though this exemption was probably worded with reference to the parties themselves contracting the marriage, it must be extended to parents and guardians in those districts in which marriage-contracts are always entered into between the parents, &c., on account of the tender age at which children are betrothed to each other; 2, that a penalty of Rds. 300 by which the parties had mutually bound themselves to the performance of the contract should not be considered protected by this exemption; for, if the parties introduce a penal clause into such contracts they should use the stamp necessary for such obligations: and 3, that as this stamp was insufficient to cover an obligation of that amount, the penalty could not be recovered, but that the instrument should be considered as a valid contract without penalty for the marriage of the children.—No. 604, D. C. *Trincomalie*, (M.)

Penalty.

Prescription—Adverse title.

103.—The meaning of the expression "adverse title" is not that the title must in express terms negative that of the claimant (for this would be impossible); but that the right of the possessor should not be derived from that of the claimant, as in the case of a tenant holding from his land-

lord,—or dependant on that of the claimant, as when a person is allowed to occupy by permission from the real owner,—or collateral to it, as in the case of one of two joint-tenants;—in other words, the possession must be such as is inconsistent with the probability of any just right or title on the part of the claimant.—No. 1271, D. C. *Chilaw*, (M.)

Dismissal—Absence of Witnesses.

104.—The plaintiff's witnesses being absent, and the plaintiff declining to pay the expenses of the defendant's witnesses; *Held* that the District Court was justified in dismissing the suit; but the case was referred back for re-hearing, on the ground that the summonses had not been served on the absent witnesses; and that their absence might not therefore be attributable to the fault of the plaintiff.—No. 1270, D. C. *Putlam*, (M.)

Title to sue—pleaded, but not proved.

105.—Where the plaintiff's title to sue as Administrator was not called in question by the defendant, and might from the tenor of the pleadings have been almost taken for granted; yet the objection having been raised at the trial; *Held* that the plaintiff ought not to have been taken by surprise, and must therefore be allowed to supply the deficient evidence on that point.—No. 11498, D. C. *Caltura*, (N.)

September 3.

Promissory Note—Payment by delivery of.

106.—The mere fact of having delivered a Promissory Note to the plaintiff, is no answer to an action, unless the defendant could also prove either that the money had been ultimately paid to the plaintiff on account of the defendant, or that the plaintiff had received the note expressly in satisfaction of the debt.—No. 512, D. C. *Negombo*, (M.)

Mortgage—Priority of, over subsequent sale.

107.—Where a debtor had granted a Bond, by which he bound himself, in default of payment within three months, to give possession of certain lands to the plaintiff, to be held in lieu of interest, and to be redeemed by payment of the principal sum; *Held* that such Bond should have preference over a subsequent Sale, which must be considered subject to the previous incumbrance,

Remedy of Purchaser.

as to which it was the duty of the purchaser to make enquiry. If the purchaser was defrauded by the seller, he should have sought his remedy against him, and not against the plaintiff, who was no party to, nor consulted about, the sale.—No. 3149, D. C. *Amblangodde*, (M.)

Desertion of Wife—

108.—Where a Wife had sued her Husband for having abandoned her and her children, and the District Court had directed "that the wife should be quieted in the possession of the garden and house in which she then resided, &c."—*Held* that the decree went further than the evidence (which was very weak as to the wife's possession) or the relative position of the parties would warrant. The Judgment was therefore modified as follows:—" that the defendant should be compelled to support the plaintiff as his wife and the mother of his children, and to allow her and them to reside in his house: and that if he should refuse or neglect so to do, the District Court, on complaint of the plaintiff, should then award her a reasonable proportion of the defendant's property: or, if he should desert and abandon his said wife and children, the plaintiff should in that case be put and maintained in the undisturbed possession of the estate, mentioned in the decree of the District Court."—No. 64, D C. *Ratnapoora*, (M.)

Amount and mode of Maintenance.

Conditions—Overplus upon Re-sale.

109.—Where a previous purchaser of lands which had subsequently been re-sold at his risk, was aware of the conditions under which he had become a purchaser, the overplus arising from such re-sale was *held* to be due, not to him, but, under the terms of the conditions, to the Government, as vendor.—No. 857, Pr. C. *Jaffnapatam*, (M.)

Sept. 6, (M. R.)

Insanity—Evidence of.

110.—As the question of Insanity, except in very decided cases, is a matter of mere opinion the naked expression of such opinion is not entitled to any great weight, unless followed by an explanation of the facts or circumstances on which it is founded.—No. 1448, D. C. *Islands*, (M.)

Sept. 17, (M. R.)

Service of Process.

111.—Service of a Notice (under rule 13 of sec. 1, *Rules and Orders*) at the house of the defend-

ant, when he could not be found so as to be served personally, was *held* perfectly good service: but *held* irregular for the following reasons:— 1, that the man named Hendrick Appoo (for it did not appear whether he was a peon or not,) only *reported* that a copy of the notice had been left at the house; whereas the *officer* who actually left it should *swear* or *declare* that fact, as having been done by himself; and 2, that though a space was left for the name of the Deputy Fiscal, the signature of that officer did not appear. But again this irregularity was *held* to have been waived; because the Proctor for the defendant having shewn by his petition of appeal that the order had reached either himself or his client, (which is the only point really material as regards the information to be conveyed to the defendant,) the object of the order had been fully attained.

Forms of Returns.

It is absolutely necessary that the returns to all process and orders of the District Courts should be regularly made, as given in the Forms (sec. 1, *Rules and Orders,*) but which must of course be varied according to the circumstances under which the service was really made or attempted to be made.—No. 460, D. C. *Caltura,* (M.)

Sept. 24, (M. R.)

Suit *in forma pauperis.*

112.—Where a widow, claiming to sue as a pauper, was proved to be possessed of lands above the prescribed value, but it appeared that her children were entitled to certain shares therefrom, the value of which, if deducted, would have reduced the property below the amount prescribed; *Held* that as the children were to be presumed to be equally entitled to any shares which their mother might recover in the action, they ought either to be made parties to the action, or, being interested in the result, should contribute towards the expense of it. The permission to sue as pauper was therefore withheld. *Held* also, that the permission ought not to be granted to any one who does not come into Court free from all suspicion of fraud or deception; and that as the party had, in her statement, concealed the fact of her being entitled to land of any kind, she was not entitled to the indulgence sought for.—No. 220. D. C. *Amblangodde,* (M.)

Joint-owners.

Concealment of property.

October 8, (M. R.)

Absence through illness.

113.—If a party is too ill to attend Court on the day of trial, it is his duty to send some person to represent and prove that circumstance to the satisfaction of the District Judge, or to employ a Proctor to conduct his case. And on these grounds, the Supreme Court refused to set aside a decree pronounced against the appellant.—No. 2161, D. C. *Colombo, S*, (M.)

Oct. 15, (M. R. N.)

Pearl-Fishery—Failure of Consideration.

114.—The defendant, on whom the Government had bestowed a charity or temple-boat for the ensuing pearl-fishery, agreed, by a deed, in consideration of £300, to transfer to the plaintiff the right of fishing this boat, (5 days' regular fishing being allowed by Government,) according to the price at which Government should sell its other boats, and after deducting that price to repay the balance of the £300 with interest. Owing however to the boat not being provided with the necessary licence on the first day, that day's fishing was lost to the plaintiff, who brought an action to recover back one-fifth of the price; *Held* that the plaintiff was entitled to recover.

Right to a Remission of the Price.

After the fishing was concluded, the result having turned out less profitable than had been anticipated, the Government granted a remission to those who had purchased boats, of one-third of the price; which remission also the plaintiff claimed: but *held* that the Court could not introduce by implication a condition which the parties should have expressed in the agreement. The subsequent remission made by Government was purely arbitrary, both as to its being made at all, and, if made, as to its amount; and the defendant could not be compelled to the performance, as a duty legally incumbent on him, of that which was a mere voluntary act of indulgence on the part of the Government.—No. 1967, D. C. *Colombo, N*, (M.)

Condition not implied.

Dowry-property—not liable to husband's debts.

115. By the customary law of the Malabar Districts, dowry-property and the rents and profits arising therefrom, are not answerable for the

husband's debts, and need not therefore be included in the statement or schedule given in by the insolvent husband.—No. 2089, D. C. *Jaffna*, (M.)

Oct. 17, (M. R.)

116.—Where a bond expressed an amount to have been "now received in cash," and the evidence as to the consideration was to the effect that the plaintiff's brother had previously assigned to the plaintiff a debt due from the defendant for which the defendant afterwards granted to the plaintiff the bond in question; *Held* 1, that the variance was not necessarily fatal to the plaintiff's claim; and 2, that (supposing the defendant to have granted the bond through the persuasion of the plaintiff's brother,) the debt thus surrendered would form a perfectly valid consideration for the bond.—No. 115, D. C. *Jaffna*, (M.) Consideration. Variance.

117.—Double costs as taxed in England are the amount of the taxed costs and half that amount added.—No. 8409, D. C. *Walligame*, (M.) Double costs.

118.—The Rules of Practice do not allow the Court to dispense with further evidence, except where it is considered that the point in question is already established to the satisfaction of the Court.—No. 3897, D. C. *Jaffna*, (M.) Evidence—dispensing with.

Oct. 22, (M. R. N.)

119.—The objection that a mortgage-bond has not been passed before a Notary, should be taken when the bond is offered in evidence. Where the judgment has been acquiesced in by the defendant, or, if appealed against, has been affirmed, it is too late for him or any other party to object to any alleged irregularity in the instrument on which the judgment was founded.—No. 906, D. C. *Chilaw*, (M.) Regulation of Frauds. *Res Judicata.*

120.—Though a District Court may in the first instance have directed execution to issue only against the property of the defendant, it is not by any means precluded from subsequently granting execution against the defendant's person, if it see sufficient reason under the particular circumstances of the case so to do.—No. 1201, D. C. *Colombo, N*, (N.) Execution against person.

Documents—Proof of.

121.—No documents, nor even copies of decrees, can be received as evidence, unless regularly proved and shewn to relate to the object in dispute.—No. 385, D. C. *Chilaw*, (M.)

Oct. 29, (M. R. N.)

Costs—Several defendants.

122.—Where one of five defendants was the sole cause of an action, the Supreme Court held that all the costs incurred in the case should be borne by him alone.—No. 1, D. C. *Pantura*, (M.)

November 19, (M. N.)

Res Judicata.

123.—Where it appeared that a former suit, which had been brought against the same defendants and for the same piece of land, had been dismissed; *Held* that such dismissal was conclusive against a second action. If all the witnesses of the plaintiff had not been heard in the former case, that would have furnished a good ground of appeal against that decision; but could afford no reason for a fresh action.—No. 3369, D. C. *Pantura*, (M.)

Nov. 26, (R. N.)

Priority of Deeds.

124.—Although with regard to Wills the rule of Law is clear that the last should prevail, the converse, in general, holds with respect to deeds among which, *cæteris paribus*, the first is entitled to preference. But in order to be entitled to this preference, the deed must not only be signed, sealed and attested, but it must also be delivered: and so essential a requisite is delivery, that of several deeds, the one first delivered will prevail, even though, in point of date, it be last.

Delivery.

Where there was no direct evidence to shew when the deed had been delivered; *Held* that it might fairly and legally be presumed, from a party's long possession, that the delivery took place immediately after the execution; and such a deed would necessarily take precedence of another, which, though prior in date, was clogged with a condition by which the delivery of it was postponed to a period subsequent to the presumed delivery of the later deed.—No. 10157, D. C. *Seven Corles*, (N.)

December 3, (M. N.)

125.—Where upon an application for Administration by the sons of the intestate, the opponent disputed their legitimacy, *Held* 1, that the Regulation No. 9 of 1822 could not be insisted upon as necessary for the establishment of the parent's marriage, the provisions of that Regulation being prospective from the 1st August 1822, previously to which the applicants were presumed to have been born; and 2, that it was incumbent on the applicants to offer *some* evidence either of their mother having been married to their father, or of her having been treated by him, and considered by the neighbours, as his wife. This evidence having been offered,—and the District Court might safely content itself with slight evidence to this point,—the presumption of Law would be that the applicants were the issue of that lawful connexion, unless the opponent were in a situation to offer positive evidence of their having been born out of wedlock.—No. 1922, D. C. *Chilaw*, (M.) Evidence of Marriage.

Dec. 5, (M. R. N.)

126.—From the *Thesawalame* (appended to Van Leeuwen's *Comm.* p. 763, 4,) it would seem that in the Northern Province the right of Pre-emption only existed where the party claiming it held a mortgage or some other claim upon the land. At all events, it seems the height of injustice that this right should be enforced, except on payment of the highest price which any other person would offer for the land. The right must be founded on the contiguity of the land to be sold to that already possessed by the party seeking to exercise the right. To him therefore the land must be more valuable than to others, and he ought consequently to pay the best price which could be got for it.—No. 210, D. C. *Tenmoratchy*, (M.) Right of Pre-emption.

127.—Although, by the Stamp Regulation, a Receipt is inadmissible in evidence unless duly stamped, there is nothing to preclude a party from proving an alleged payment by less decisive evidence.—No. 1855, D. C. *Batticaloa*, (N.) Receipt—Stamp.

Dec. 10.

Plaintiff's Vendor.

128.—A plaintiff is entitled to have his vendor summoned as a co-defendant to warrant and defend his title to the property in dispute, or to call him as a witness to prove his right to dispose of the property; but the former is the more preferable course as in the event of the vendor's failure to make out his title, he may be decreed to repay to the plaintiff the amount of his purchase money.—No. 2194, D. C. *Batticaloa*, (N.)

Dec. 17, (M. R. N.)

Pauper—Certificate of Proctor.

129.—A Proctor, to whom the petition to be allowed to defend *in forma pauperis* had been referred, having certified that the petitioner had not, in his opinion, a good ground of defence; *Held* that the District Court was bound by the Rules of Practice, to reject the petition.—No. 414, D. C. *Wadimoratchy*, (M.)

Dec. 22, (M. N.)

Voluntary payment.

130.—Where a man has paid money voluntarily, he cannot recover it back merely on the ground that the person receiving it could not have enforced his claim in a Court of Law.—No. 58, D. C. *Hambantotte*, (M.)

Title by Prescription.

131.—A title acquired by Prescription would not be affected by any irregularity in the instrument under which the claimant first obtained possession.—No. 1953, D. C. *Islands*, (M.)

Creditor—when bound to return a Pledge.

132.—A creditor is not bound to deliver up a pledge until the whole of the money advanced by him upon it has been paid. He is therefore justified in refusing to accept the tender of a smaller amount, or to deliver up the pledge; and the costs of a suit brought by the debtor for the recovery of the pledge should fall exclusively on himself. It would seem sufficiently hard on a creditor that he should have been kept out of his money for several years without interest or any advantage, except the use of the thing pledged. But on this point the Supreme Court felt bound to recognize the custom stated by the Assessors

as regulating this description of dealing in the District of Chilaw.—No. 1828, D. C. *Chilaw*, (M.)

133.—A dismissal or non-suit in a former case is not conclusive against the plaintiff, if he could, in a subsequent action, shew by evidence not in his possession at the former trial, that at the time (*ex. gr.*) of the alleged trespass he was the legal proprietor of the land.

Dismissal—Nonsuit.

A receipt of the purchase-money paid for such land, dated two years after the cause of action had accrued, is not sufficient evidence that the plaintiff was the legal owner of the land at the time the defendant committed the act complained of.—No. 84, D. C. *Caltura*, (M.)

Evidence of ownership—

134.—*Held* 1, that though the word "Bond" had been used by the parties in their pleadings, yet, if the instrument was, in truth, a mere agreement, it would be governed by the prescription of three years: and 2, that the nature of the contract, by which the defendant had engaged to supply to the plaintiff a certain quantity of areca-nuts within twenty days from the date, made it improbable that the plaintiff would have allowed six years to elapse after the defendant's default, without suing for it.—No. 216, D. C. *Caltura*, (M.)

"Bond"—Agreement.

Prescription.

Dec. 29, (M. R. N.)

135.—The Charter, in directing that the decisions or awards of *Gansabes* should be respected, never contemplated a party having recourse to that jurisdiction, after proceedings had been instituted before a more regular tribunal. The parties should resort to that mode of decision, before the commencement of an action in the District Court.—No. 1780, D. C. *Chilaw*, (M.)

Jurisdiction of *Gansabes*.

Dec. 31, (M. R. N.)

136.—If the defendant were resident in a remote district, it would be hard upon him to be sued in another court merely because one item of a long account had its origin within its jurisdiction; but where the defendant resides in an adjoining district, it can be no hardship on him to be called upon to answer.—No. 1434, D. C. *Galle*.

Jurisdiction—Residence.

Seamen—engaging for the whole voyage.

137.—The defendants (Seamen) had agreed for a voyage from Bombay to Madras or Calcutta; and this was held to include detention for necessary repairs. In refusing therefore to remain with the vessel during such detention, and to proceed with her afterwards, the defendants were guilty of a breach of their engagement, for which they would be liable in damages, if the Master could shew that by their desertion he had really sustained a loss.

Parole engagement of Seamen.

The Master having brought his action to compel the Seamen, by the authority of the Court, to return to the vessel; *Held* that it was necessary that he should have complied with the Act of Parliament which permits the exercise of such authority, by having had his contract with the seamen reduced to writing. Not having done so, he could only avail himself of the ordinary action for damages.—*Poulier* v. *Cader*, D. C. *Galle*, (M.)

Prescription—Services.

138.—The Proclamation of the 18th September 1819 bars actions for the enforcement of services or to recover possession of land for refusal to perform them, where it appears that the party claiming them has allowed ten years to run without demanding the performance of them.—No. 7190, D. C. *Ratnapoora*, (M.)

Previous demand.

139.—In an action on a bond for money borrowed by the defendants, who thereby promised that certain deeds about to be executed in their favor should be delivered to the plaintiff, who should then receive a mortgage for the amount due on this and other bonds, all of which should then be returned; *Held* 1, that no previous demand of performance was necessary on the part of the plaintiff, because the defendants having undertaken to perform certain things, which, when performed, would have furnished a substitution of the bond in suit, it was for the defendants to perform those engagements, if they wished to relieve themselves from their liability under the original bond; and 2, that (no time having been fixed) three months and a half allowed a reasonable time for the performance of what was to be done.—No. 492, D. C. *Caltura*, (M.)

Reasonable time for performance.

1835, *January* 14.

140.—In declaring a party to be confirmed in the possession of any land, the decree must be limited to his right as against the adversary in that particular suit, and cannot be taken as against the rest of the world.—No. 6311, D. C. *Ratnapoora*, (M.)

Decree—Third parties.

Jan. 21.

141.—The evidence of a person to whom a matter has been referred for investigation may be of great weight; but where a party has given no consent to the matter being referred to the decision of an Arbitrator or Umpire, he cannot be bound by the award.—*Kiribatcoemboere* v. *Parecoembore*, Jud. Com. *Kandy*, (M.)

Reference to Arbitration.

Consent of the parties.

Jan. 28.

142.—Where Security in Appeal had been received by the District Court, though the time prescribed had elapsed, it was presumed that it had been proved to the satisfaction of the District Court, according to rule 5 of section viii, that the omission was not imputable to any negligence on the part of the appellant; and the Supreme Court therefore did not hesitate to receive the appeal.—No. 1869, D. C. *Chilaw*, (M.)

Security in Appeal.

February 4.

143.—Where the defendant, by his answer, had admitted the plaintiff's claim, but it did not appear that he had tendered it previous to action; *Held* that the plaintiff might have had judgment for the same at once, and that all further proceedings were unnecessary. It was therefore ordered that the costs should be taxed against the defendant up to the time of filing answer inclusive, and those incurred subsequently to filing the answer, against the plaintiff.—No. 7820, D. C. *Ratnapoora*, (M.)

Tender Costs.

Possession of deed.

144.—The possession of an instrument by the plaintiff is a presumption against the payment of the money due thereon, though certainly not conclusive.—No. 14516, D. C. *Caltura*, (M.)

Feb. 7.

Minority.

Necessaries.

145.—If it can be proved that a party was openly engaged in trade, his minority would be no plea to an action: or if the money claimed against him were advanced for the necessaries of life, either himself or his father is liable for the amount. The plea of Minority is a defence which should be admitted with some caution, lest it should be made the means of defeating a creditor of a debt justly due to him and incurred by the minor under circumstances which in justice ought to preclude his sheltering himself under a supposed incapacity to enter into contracts.—No. 854, D. C. *Negombo*, (M.)

***Feb.* 11, (M. N.)**

Temple-property.

Construction of deed.

Condition implied.

Donation—

Ground for Revocation.

146.—Where a party (Francisco *Caporale*) had by deed "allowed the plaintiff the Temple at Uggabbodde, and authorised him to officiate therein, whenever he, Francisco, should be unable to attend to it, or after his death; taking charge of the said Temple together with the things required for the office of *Caporale; Held* 1, that this was not a transfer of the property of the Temple, but merely an authority to the plaintiff to officiate at, and take charge of the Temple as Francisco's deputy in case of his illness, or as his successor in case of his death; 2, that to the enjoyment of these privileges, one condition should be considered as annexed, because it was essentially necessary to such enjoyment, viz., that the plaintiff should qualify himself to perform the duties of his office; and 3, that even if the deed were to be considered as a *donatio inter vivos*, the non-fulfilment of this necessarily implied condition, would have furnished the donor with a sufficient ground of revocation.—No. 540, D. C. *Caltura*, (M.)

Qualification for Office.

147.—Where it was contended that a party (defendant) was incapable of succeeding to the office of *Caporale*, on the ground that he was

descended from a female branch of the family of the original *Caporale ;* the Supreme Court, without entering into that question, ***held*** that, as it appeared that the plaintiff, not being himself self qualified to act as *Caporale,* had agreed with the defendant that the latter should do the duties, he could not be permitted to argue that the defendant was legally disqualified from performing rites which the plaintiff had himself employed him to perform.—*Ibid.*

Cannot be questioned, when.

Feb. 20, (M. R. N.)

148.—The rights of an Insolvent pass to his creditors on his receiving the benefit of the Insolvent Act. But it would be hard and unjust towards him, if he were precluded, by the disinclination of his creditors to take proceedings, from recovering debts which may enable him to discharge a part of those for which his future property is still liable.

Insolvent—may sue, when.

Where a party who had been declared an insolvent, had brought an action for recovering money; which action was, on the objection being taken, dismissed; the Supreme Court referred the case back to give the plaintiff an opportunity of giving notice of such action to his creditors or their legal representatives, and of making them parties to the suit if they wished it. If they declined interfering, the plaintiff was to be allowed to continue the action, but only in the nature of a trustee for his creditors, to whose use any sums recovered by the plaintiff would be received and held by the Court.—No. 1875, D. C. *Allipoot,* (M.)

149.—Where a party had the assistance of an experienced Proctor, it was held that the plea of ignorance could not be received as a plea for not having summoned the necessary witnesses.—No. 1029, D. C. *Jaffna,* (M.)

Ignorance.

150.—Where the District Court recommended a plaintiff "to recover the costs from the *Odear,*" (on account of whose alleged neglect, the plaintiff had been obliged to abandon his suit;) ***Held*** that this was not a decree by which the Odear

Decree—Recommendation.

could be compelled to pay the costs, without being himself heard in a separate action.—No. 442, D. C. *Jaffna*, (M.)

Conviction. Cl. of the Regn.

151.—The plaintiff is bound to point out the clause of the Regulation on which he asks for a conviction.—No. 1281, *R.* v. *Neyna Mohamadoe*, D. C. *Trincomalie*, (M.)

Prescription—Interruption of.

A previous Action.

152.—In an action to recover certain lands, it appeared that the defendant had previously commenced an action against the plaintiff for disturbance of his possession, which however he had not pressed to a conclusion; but it was in evidence that the defendant had been in possession ever since his purchase, remaining in possession during such suit, and continuing in possession up to the present action;—*Held* that the mere circumstance of the defendant having commenced the previous action which he did not press on, was not sufficient to bar the right of prescription which his possession had conferred upon him.—No. 1623, D. C. *Batticaloa*, (M.)

Dowry-property—Sale by Husband.

153.—Where a Husband had sold dowry-property under circumstances which shewed that the wife must have been cognizant of the transaction, and the (Wife the parties being Mahomedans) contended that she had given her husband no authority to dispose of it, and that by the Mahomedan Law he had no right to dispose of it without such authority; *per* MARSHALL C. J.—"If this were so, the Law would be made the instrument of gross fraud,—a purpose to which no Code of Laws should ever be allowed to be applied."—No. 2461, D. C. *Batticaloa*, (M.)

Title-deeds—Possession of.

154.—If the title deeds of any property be in the hands of the owner, there is nothing to prevent a stranger, or any one not acquainted with the fact of a sequestration of the property, from buying the property or taking it in mortgage; the possession of the muniments being *prima-facie* evidence of the right to sell or dispose of such property.—No. 2696, D. C. *Batticaloa*, (M.)

155.—Where an order had been made on the 10th Nov., that notices should issue for the appearance of the parties on the 24th of that month; and it appeared that the notice had not been issued to the plaintiff till the 17th, and not served on him till the 22nd; *Held* that the time allowed to the plaintiff was insufficient; and the case, which had been struck off on account of the plaintiff's non-attendance, was ordered to be restored to the list, to be proceeded with in due course. —No. 569, D. C. *Caltura*, (M.) Service of Process. Insufficient time.

Feb. 23, (M. R. N.)

156.—A will executed in the Isle of France must be transmitted to and proved in Ceylon for the property in this Island.—No. 6047, D. C. *Kandy*, (M.) Foreign Will.

157.—On a question as to the preferent right to Administration between the Widow and the Brother of the deceased (the parties being Mahomedans), it was *held*, upon the opinion of Moorish Assessors, that if the widow had a son or two or more daughters, she would be entitled to administration in preference, the joint interest of the widow and children being greater than that of the brother; but if no children or only one daughter, the brother having a greater interest would have a preferable claim. Administration—Preferent right.

In this case, it appeared that the widow was married to her opponent, the brother of the deceased; and she complained of having suffered ill-treatment from the opponent;—*Held* that such ill-treatment, if proved, would be of importance in the case; first, as tending to show that the interest of the children would probably be neglected; and secondly, as entitling the widow, (if administration should be granted to her husband,) to expect good security from him for her share.—No. 20, D. C. *Matura*, (M.) Character of Applicant.

Feb. 25, (M. R. N.)

158.—Where the plaintiff claimed a share in certain lands, on the ground that he had possessed them jointly with the defendant; but it appeared that the occupation by the plaintiff and his mother had only been by permission of the defendant; Possession by permission.

Held that if this ground were allowed to be valid, every similar act of charity or kindness might be construed into an adverse possession by which a prescriptive title might be acquired.—No. 168, D. C. *Matelle,* (M.)

March 5.

Action against a late officer of a Temple.

159.—In an action against a late *Basnaike Nilleme,* it was held that, in the absence of any evidence of fraud, peculation or embezzlement of the offerings or produce belonging to the Temple, the defendant, being out of office, was no longer responsible in respect of them to the plaintiff (an *Unanse*), who should consequently seek redress from the officiating *Basnaike Nilleme.*—No. 1776, D. C. *Allipoot,* (N.)

Transfer of Cases.

160.—Where it appeared that the District Judge of the South Court, who had previously been the District Judge of the North Court, had heard the whole of the evidence in a case pending in the latter Court, and had been removed to the former Court before he could enter up judgment, the Supreme Court, on the motion of the plaintiff and with consent of the defendant, ordered the case to be transferred to the South Court under the 36th clause of the Charter, on the ground that the case was ripe for decision and that justice would be more fully and effectually done, if it were decided by the same Judge.—No. 11553 and No. 11353, D. C. *Colombo, N,* (N.)

Mar. 11.

Reg. of Frauds—not retrospective.

161.—Where an agreement appeared to have been made in 1815; *Held* that the Regulation against Frauds passed in 1817 could not apply.—No. 11876, D. C. *Caltura,* (N.)

Absence on the day of Trial.

162.—A case was remanded to the District Court for hearing, on condition that the appellant should prove, to the satisfaction of the District Judge, the assertion in his Petition of Appeal, viz. that he had attended the Court on the day fixed for the trial, but too late to be present when the case was called on.—No. 11456, D. C. *Caltura,* (N.)

Mar. 25.

163.—A party who attempts to deceive or mislead the Court may be fined, under rule 29. sec. i. of the *Rules and Orders.*—No. 13592, D. C. *Galle,* (N.)

A party to a suit may be fined.

164.—A person who, by his own shewing, has been so grossly careless as to pay off a bond without obtaining either a receipt or the bond itself from the creditor, should be left to protect himself, as he best may, from the consequences of his own negligence and folly, in the event of his being sued for the amount of the bond; but it would be a dangerous precedent, were so solemn an instrument recoverable by legal process from the hands of the creditor upon the mere parole evidence of two witnesses as to payment, especially in a country where such evidence is too readily obtainable.—No. 4627, D. C. *Colombo, N,* (N.)

Proof of Payment.

Action to recover Bond from Creditor.

April 1, (M. N.)

165.—A case was remanded to the District Court in order that the son of the defendant, who appeared to have been the real purchaser at a Fiscal's sale, might be summoned as a defendant, and that the case might be proceeded with and decided as if the son had been originally a party; and it was *held* that, though it might be singular that the plaintiff should have made no opposition to the sale at the time, yet he was entitled to have his evidence heard.—No. 543, D. C. *Caltura,* (M.)

A person subsequently joined as a defendant.

Non-opposition at a Sale.

166.—Though a debt is admitted by the Answer, yet if it be not accompanied by payment of the money into Court, the plaintiff is entitled to his costs.—No. 918, D. C. *Negombo,* (M.)

Claim not tendered—Costs—

167.—If, in consequence of the plaintiff's refusal or neglect to admit any facts stated in the defendant's Answer, evidence has become necessary for the purpose of establishing those facts, and such facts appear to have been truly stated, the expenses incurred by the defendant's witnesses should be borne by the plaintiff.—*Ibid.*

Expenses of Witnesses.

168.—Where the applicant for Administration had failed to tender security to the satisfaction of

Administration—Security.

the District Court on the day appointed for that purpose, the Supreme Court directed the administration to be granted to some person better able and willing to perform the duties of that office. —No. 1923, D. C. *Chilaw*, (M.)

Proctor—Absence of.

169.—No private interests ought to induce a Proctor to quit his post without either obtaining the consent of all parties to the postponement of such cases as might otherwise come on in his absence, or else transfering his cases with the consent of his respective clients to other hands. And where a case had been struck in consequence of the Proctor's absence, the Supreme Court ordered it to be restored to the list, on payment by him of the costs incurred on the day of hearing by both parties.—No. 12241, D. C. *Caltura*, (M.)

Prescription—Previous title.

170.—Evidence shewing that prior to the commencement of the term of prescription, the party had no just claim, does not affect the prescriptive title.—No 183, D. C. *Caltura*, (N.)

April 8, (M. N.)

Variance.

171.—The libel stated that the debt in question had been "assigned by A. to the plaintiffs, in trust for the creditors of the said A;" but the deed of assignment produced by the plaintiffs stated the transfer of the debt to have been made to the plaintiffs "to their own proper use and benefit for ever," without referring to the creditors or to any trust;—*Held* that the plaintiffs' claim should, on this ground, be dismissed; for the deed, instead of supporting the plaintiff's claim, contradicted the character of trustees for the creditors, which was assigned to them by the libel.—No. 3740, D. C. *Colombo, N*, (M.)

Defamation.

172.—Where the expression used by the defendant, though indecent and improper, yet appeared to have been uttered in a moment of heat and irritation, as mere idle abuse and without any intention of seriously imputing illegitimacy to the father of the plaintiff, or of reflecting on the character of that person or his family, the Supreme Court decreed each party to pay his own costs.—No. 767, D. C. *Caltura*, (M.)

April 13.

173.—A Proctor who quits the District wherein he has practiced, leaving his business undone and unprovided for, renders himself liable for any damage which his clients may sustain by such dereliction. Where however no damage has been sustained beyond loss of time, it is sufficient to order that the Proctor do account to his clients for the sums received by him on their account.—*Pet. of W. D. Pauloe*, (M.) Proctor neglecting his duty.

May 2, (M. R. N.)

174.—The Law raises a contract by implication only where the parties have failed to state their agreement in express terms. The defendant had promised the plaintiff, who was a Medical Practitioner, that "if he succeeded in curing the defendant, he should be handsomely paid for his trouble";—*Held* that the plaintiff, having failed to cure the defendant, could not recover. Implied Contract.

A stipulation that the plaintiff should forfeit all remuneration in case he fails to cure the defendant, does not affect the validity of the contract; and unless contrary to some positive law or order, is binding.—No. 3352, D. C. *Colombo, S*, (M.) Remuneration of Medical Practitioner.

175.—A defendant is not absolutely precluded from applying to defend as a pauper, because the application had not been made in the first instance; for misfortunes may befall a party during the progress of the suit, which may incapacitate him from pursuing his defence, though he may have been in circumstances to commence it in the ordinary manner.—No. 6319, D. C. *Colombo, S*, (M.) Application to defend *in forma pauperis*.

176.—Where the plaintiff sued an administratrix for the funeral expences incurred by him; and it appeared that the latter had already filed her final account; *Held* that the lapse of time was a sufficient ground for dismissing the suit.—No. 1965, D. C. *Chilaw*, (M.)

177.—Certain property of C. M. had been sequestered by Government (under the Reg. No. 7 of 1809) in Nov. 1828. In Aug. 1832, C. M. Sequestration—Waiver of.

being dead, his administrator sold the property to the plaintiff by a notarial deed attested by the Head-Clerk of the Cutchery, (who had previously been Secretary to the Court which granted the sequestration). Shortly after such sale, publication was made of the property to satisfy the claim of the Government.—*Held* that the length of time suffered to elapse between the sequestration and publication, the allowing the title deeds and keys to remain in the possession of C. M., (which would always enable the possessor to hold himself out to the world as the legal proprietor,) and the execution of the deed by the officer who, of all persons, must be supposed to have been best acquainted with the sequestration, if it had been matter of such notoriety (as was contended for by Government), must all be considered as amounting to a waiver on the part of Government or its officer to avail itself of the sequestration.—No. 2696, D. C. *Batticaloa,* (M.)

Stamp—Registry of *Cartoms.*

178.—On a question as to the admissibility in evidence of a *Cartom,* it appeared that it had been the custom to enter the *Cartoms* themselves, the originals, in a public book kept by the Government Agent for that purpose, and that these entries had never been made on stamp;—*Held,* as regards these entries, that it would be impossible to declare a stamp to be necessary without invalidating the whole Registry of these instruments, —an injustice which would be so much the greater, that the custodier of them was of all others the most likely to object to the want of the requisite stamp, and whose acquiescence in these unstamped entries must therefore have been the best assurance to the public that stamps were unnecessary.—No. 6095, D. C. *Jaffna,* (M.) See also *Circuit Minutes,* 9. July, 1834.

Evidence—Copies inadmissible.

179.—In the foregoing case a Moorish Priest had stated in evidence that the original *Cartom* was a bare agreement for the marriage, and that before that agreement could be carried into effect, a copy should be taken on stamp; but *Held* that the recognition of such a doctrine would be subversive of a well-known and essentially useful rule of evidence, that a copy should never be

received in evidence where the original could be procured.—*Ibid.*

180.—In an action by the Government for the value of a certain quantity of paddy issued to the defendant by a Government store-keeper, the defendant disputed the claim on the ground that the store-keeper was not bound to issue the paddy, and that he ought not to have done so without the signature of the Government Agent;—*Held* that this might possibly be true, but it did not by any means lessen the defendant's liability. The Servant may be wrong in delivering the Master's property to another, but the person obtaining it would still be responsible for its value.—No. 2095, D. C. *Trincomalie*, (M.)

Master and Servant—Contract with the Servant.

181.—It would be the height of injustice to deny a defendant credit for sums paid by him and received by the plaintiff or his servants, merely because for *some* reason (whether good or bad is of no importance) it was not considered right to grant him receipts. If it was not intended to credit him with the payments, the sums paid should have been returned to him.—No. 1397, D. C. *Trincomalie*, (M.)

Money paid without taking Receipts.

182.—The plaintiff appealed on the ground that she was not a party to certain former suits,—and literally speaking this was true;—but as it appeared that her son had been a party to those suits, and his interests were identical with those of the plaintiff; *Held* that it was the same thing as if the parties were individually the same.—No. 1855, D. C. *Kandy*, (M.)

Decree—when binding on Third Parties.

May 6, (M. N.)

183.—Notes of Hand which do not contain any words importing the liberty of transfer to third parties (such as "or order," "or bearer", &c.) cannot be viewed in the light of negotiable instruments or bills of exchange by which the maker or drawer holds himself out as unconditionally liable to the holder, whoever he may be; but must rather be considered as simple acknowledgments of debts due by the party granting them to the particular persons therein mentioned,

Unnegotiable instruments.

and, like any other debts, carrying with them, if transfered to third parties, the same condition and liability to objection which originally attached to them. And as the words " value received" would not preclude the plea of want of consideration as against the original creditors, neither can they as against a third party who has merely stepped into their situation.—No. 5232, D. C. *Kandy*, (N.)

Dismissal—Nonsuit.

184.—A dismissal for want of sufficient proof is only in the nature of a non-suit, and will not bar the plaintiff from establishing his claim in another action.—No. 2027, D. C. *Islands*, (M.)

Application to sue *in forma pauperis*—Former decree.

185.—Where there was a former decree against the plaintiff, which the District Court considered decisive of his claim; *Held* that the Judge was right in rejecting his application to sue as a pauper; but that the party was still at liberty to commence his action in the ordinary way.—No. 445, D. C. *Walligame*, (M.)

Recommendation to sue.

186.—It by no means follows that because a criminal prosecution against the same defendant has been dismissed, and the complainant has been recommended to bring a civil action, he must necessarily succeed in the latter suit.—No. 87, D. C. *Tenmoratchy*, (M.)

Prescription of Judgments.

187.—Judgments are not mentioned in the Reg. No. 13 of 1822, (concerning Prescription,) nor do they fall within the intention of it. The only term that would bar a judgment would be such a lapse of time as would form an irresistible presumption that it had been either satisfied or released.—No. 1096, D. C. *Caltura*, (M.)

Civil and Criminal suit.

188.—Where a party has been punished criminally for a wrong committed, it is discretionary with the Court whether it will entertain a civil action for the same act or not.—No. 1035, D. C. *Galle*, (M.)

Proctor's costs—Two Answers.

189.—Where a Proctor filed an Answer for the first defendant, and the next day filed another Answer for the second defendant, in precisely the same words, he was disallowed both the stamp and his own fee for the second answer. A separate Answer can only be necessary where the defend-

ants make distinct and several defences.—No. 406, D. C. *Amblangodde*, (M.)

190.—Where the plaintiff sought to recover, among other sums, the amount of a debt which he had engaged to pay (but had not as yet paid) to a third person on behalf of the defendant; *Held* that the demand was premature; but in order to prevent unnecessary expense, the Supreme Court ordered that when the plaintiff should have satisfied the debt, he should be allowed, on proof thereof, to have judgment entered up for it without a fresh action.—No. 6106, D. C. *Kandy*, (M.) Money *paid.*

May 9, (M. R. N.)

191.—The Supreme Court, having consulted eight Moorish Assessors, transmitted the following as their opinion, for the guidance of the District Court of Madewelletenne, in a case pending there: Separation—Dowry-property. (Mahomedans.)

1. That if a wife leave her husband of her own desire and contrary to his wishes, neither she nor any one on her behalf can claim any return of the dowried property;
2. But if the husband turn her out of his house, or desert her, she, or any one duly authorised to act for her, may recover back such property;
3. If they separate by mutual consent, such separation should be made the subject of an agreement, which should specify the terms on which the separation is to take place, and the proportion of property to be restored by the husband to the wife.—No. 98, D. C. *Madewelletenne*, (M.)

192.—In an action in which the plaintiff complained that certain property belonging to him had been inserted in a list of Appraisement filed by the defendants, and prayed that such property might "be restored to him"; it was objected by the defendants that the plaintiff asked for the restoration of property which was still in his possession; but the Supreme Court held that the act complained of was a sufficient ground of action, and over-ruled the objection, allowing the plaintiff's libel to be amended by substituting for Cause of action—Disputing the plaintiff's title. Amendment.

the words "restored to the plaintiff," the words "struck out of the List of Appraisement."

Defence, as Administrator.

The defendants indeed asserted their right, as administrators, to the property, and only prayed that the action might be dismissed, in order that they might institute proceedings to obtain possession; but *held* that this was a course which could only be suggested for the purpose of delay or swelling the costs,—either of which objects is contrary to the duty of Administrators;—and that there was no reason why the real right to the property might not be tried in the action already pending.—No. 333, D. C. *Amblangodde*, (M.)

Defendant in default—Non-joinder of Plaintiffs.

193.—Where a defendant filed no Answer, but, on the day of trial, attempted to rely on the partnership of the plaintiff with another person; *Held* that he should have pleaded that partnership, so that if it existed the partner might have been joined in the action; and that it was too late to make the objection at the trial.—No. 460, D. C. *Caltura*, (M.)

Personal delivery of List of Witnesses.

194.—There is nothing in rule 21, sec. i. of the *Rules & Orders*, to oblige a party to deliver his List of Witnesses in person or by proctor; nor does the nature of the document require it; and there seems therefore no reason why this document should not be sent by a servant or even by the post, provided it shew on the face of it enough to inform the officer of the Court in what case and on whose behalf it is sent,—the party of course taking the risk of the instrument not arriving.—No. 1195, D. C. *Caltura*, (M.)

Evidence—Proof of a Seizure in Execution.

195.—The *fact* of a plaintiff's property having been taken in execution would, if true, be a matter of public notoriety, which might be legally proved without the production of the writ. The *legality* of the seizure would depend on the regularity of the process and the due execution of it.—No. 706, D. C. *Caltura*, (M.)

Objections during Trial—Appeal.

196.—Whatever may be the weight of an objection taken during the trial of a case, it ought not to be allowed to stop the progress of the case by an immediate appeal to the Supreme Court. By rule 27 of sec. i. the objecting party has the

opportunity reserved to him of appealing, after the decree is passed, against any evidence improperly received.—*Ibid.*

May 16.

197.—Where it appeared that the land in question was situated in the district of Madewelletenne, and that the second defendant, who was the only real defendant in the case, resided within that district; the Supreme Court ordered the case which had been instituted in the District Court of Matelle to be transmitted to the District Court of Madewelletenne, to be there proceeded in and decided. If the plaintiff were permitted to carry on the suit in the former Court merely on the ground of the first defendant (who it appeared made no claim to the land,) having been joined in the action, a plaintiff might always choose the Court in which he would prefer his action to be tried, by including as defendant a person wholly uninterested in the matter at issue.—No. 632, D. C. *Matelle*, (M.)

Jurisdiction, where the defendants reside in several districts.

May 18.

198.—Where the security bond in appeal appeared to have been received by the Court below, notwithstanding the time prescribed by rule 3 of sec. viii. had elapsed; *Held* that it must be presumed to have been "proved to the satisfaction of the District Court that the omission was not imputable to any negligence on the part of the Appellant," (rule 5).—No. 459, D. C. *Amblangodde*, (M.)—See also No. 152, D. C. *Matelle*, (20. May, 1835.)

Security in Appeal received after lapse of Time.

May 20, (M. N.)

199.—Where a party had engaged himself as surety in appeal for another, viz., that the latter should "well and truly perform and abide by the judgment which should ultimately be pronounced by the Supreme Court;" and the Supreme Court had referred the case back to the District Court, with directions that the District Judge "should receive further evidence and thereupon give his judgment;" *Held* that such subsequent judgment of the District Court became virtually the judgment of the Supreme Court, and was binding on the surety.—No. 6220, D. C. *Kandy*, (M.)

Security in Appeal—Ultimate judgment.

Costs—One of several defendants condemned in.

200.—Where the plaintiff had needlessly joined a party as defendant, and at the trial the District Court had absolved the first defendant and pronounced a decree against the second defendant condemning him alone in costs, the Supreme Court modified the decree by "condemning the second defendant in the cost of the suit, except those incurred by the first defendant, which are to be borne by the plaintiff."—No. 633, D. C. *Colombo*, No. 2, (M.)*

Res Judicata.

201.—Where a defendant pleaded that a judgment had been improperly obtained in the late Provincial Court; *Held* that if true, he should have appealed against it, and that to allow a defendant to question the propriety of the former decision by the present action would be to make the present District Court sit in appeal on judgments pronounced by those tribunals, which had been superseded by the District Courts.—No. 1486, D. C. *Jaffna*, (M.)

Sequestration—Costs.

202.—Where a Sequestration had been set aside, but the District Court at the same time recorded its opinion that "there had been circumstances of suspicion sufficient to justify the sequestration," the Supreme Court directed that each party should pay his own costs.—No. 6555, D. C. *Kandy*, (M.)

Appeal under rule 5, sec. viii. Merits.

203.—On proceedings being referred to the Supreme Court to decide on the allowance or rejection of an appeal under rule 5 of sec. viii., it may examine the merits of the case to see if there exists any ground for the appeal.—No. 152, D. C. *Matelle*, (M.)

Appeal after lapse of Time—Relief.

* In this case the above order seems to have been granted by way of relief on an application by the second defendant, long after the time for appealing had elapsed, as may be gathered from the sequel of the order :—

"If the decree had been more explicit, and had ordered expressly that the second defendant should pay the costs of the first defendant as well as those of the plaintiff, the second defendant would have been bound to appeal against that part of the judgment; and if he had failed so to do, he might now perhaps be without relief. But as the decree stands, the second defendant may have supposed till the demand was made by the first defendant, that it was only intended to make him liable for the costs of the adverse party, especially as his liability could not legally be extended further."

May 27, (M. R. N.)

204.—A defendant appealed on the ground that a certain table (the value of which he was condemned to pay) had not been sold but only lent to him, and that if the cause of action had been truly stated in the libel, he would have had the option of returning the table to the plaintiff; but the Supreme Court *held* that in order to make this a just and equitable ground of defence, the defendant ought (instead of drily denying that he was indebted to the plaintiff,) to have set it forth in his answer as that on which he intended to rely, accompanying it with a tender of the table. [It appeared that the defendant having received the table from the plaintiff, had left Kandy without giving any directions as to its being restored, so that the plaintiff might not unreasonably have concluded that the defendant intended to convert that which was originally a loan into a purchase].—No. 5420, D. C. *Kandy*, (M.)

Defence—General denial.

Loan—Purchase.

205.—In order to support an objection to a party applying for the indulgence to sue as a pauper, it is not usual or necessary to frame a list of property and file the same in Court, and thereby put the party to an unnecessary expense.—No. 493, D. C. *Amblangodde*, (M.)

Application to sue *in forma pauperis.*—Opposition to.

June 3, (M. R. N.)

206.—There is no term of prescription as regards applications for or the issuing of Letters of Administration. Where however a District Court has directed Letters of Administration to be taken out, it must be presumed that the Court was satisfied that the interests of the parties concerned made such a measure expedient.

Administration—Prescription.

Where a party appears to the citation and prays that Administration may be granted to himself, he cannot afterwards question the necessity of Administration.—No. 1923, D. C. *Chilaw*, (M.)

A party when precluded from questioning necessity for Administration.

June, 10 (M. R. N.)

207.—Where an Appeal had been taken from a judgment of the Supreme Court to the King

Appeal to the Privy Council—

Proceedings in respect of Security in Appeal.

in Privy Council, *Perring* for the respondent, on the 10. June 1835, moved for an order on the appellant to shew cause why the appeal should not be declared abandoned, on the ground that no fresh step had been taken since the filing of the petition of appeal. (7. March 1835.) *Hillebrand* for the appellant stated that the sureties were ready, but that he had waited until the case should have been heard in review. It was however ordered, by consent of the parties, that the security should be taken by the District Court of Kandy, and the security-bond forwarded to the Supreme Court before the 17th instant, on which day it was ordered that the case should be heard in review, provided the security should have been then perfected, in default of which the Court would entertain the motion for declaring the appeal abandoned for want of compliance with the 11th condition of cl. 52 of the Charter.—No. 6047, D. C. *Kandy*, (M.)

June 13, (M. R. N.)

Insanity—Liability of the Father.

208,—On an action against two defendants for money lent to the first defendant, the son of the second, the latter pleaded that the first defendant was insane; but the Supreme Court *held* that even supposing the first defendant to have been out of his mind at the time of the loan, it was the duty of his father to have taken those steps which the law justifies and calls upon him to take for placing his son under that restraint which would prevent him from obtaining money from others, who might not be aware of the state of his intellect.—No. 1194, D. C. *Walligame*, (M.)

June 17, (M. R. N.)

Arbitration.

209.—Suitors cannot be forced to submit to Arbitration; but where they themselves desire that course to be adopted, they cannot object to the award.—No. 8364, D. C. *Tenmoratchy*, (M.)

Agreement of Widow previous to Administration.

210.—Where a Widow, before obtaining administration to her Husband's estate, agreed to assign certain lands to her three sons, after she should have obtained administration; the Supreme Court affirmed the judgment of the Court

below in setting aside the agreement, on the ground that it must either be an engagement to administer the estate according to law and therefore superfluous, or an undertaking to deviate from such course and therefore fraudulent and illegal.—No. 2291, D. C. *Batticoloa*, (M.)

211.—On an application for Edictal Citation, where the citations having been duly returned, the certificate had been refused on the ground that there was another person equally interested with the applicant, who had not joined and whose share had not been set apart: the Supreme Court *held* that the applicant's prayer to be allowed to amend was perfectly reasonable and was no more than is done in ordinary suits, where a party has been omitted by inadvertence; and referred the case back in order that such other person might be called in and have an opportunity of joining in the application, or, if he refused, that his share might be excluded from the proceedings.—No. 436, D. C. *Amblangodde*, (M.)

Edictal Citation—Amendment of Application.

212.—(See § 206 *sup.*) *Carr*, K. A., on behalf of the appellant to the King in Privy Council, produced an affidavit touching the execution of the security-bond before the District Court of Kandy, and a Bond entered into by Messrs. *Hillebrand* and *Morgan* (proctors for the appellant) for £300, conditioned for the prosecution of the appeal and for the payment of costs in pursuance of the sixth rule and limitation of cl. 52 of the Charter; and the bond was received and the case proceeded with in review.—No. 6047, D. C. *Kandy*, (M.)

Appeal to the Privy Council—Security.

June 19.

213.—A Foreigner, having no property within the jurisdiction, may be called upon to give security for costs; but if unable to furnish such security, he is to be admitted to swear that he will satisfy the same.

Foreigner—Security for Costs.

In such a case the Supreme Court directed that the security to be required from a foreigner for costs, should be a bond by himself alone in the penal sum of £30 if he should not pay such

costs as might be awarded against him, or should leave the Island or attempt to do so without first paying all such costs; and *per* MARSHALL, C. J.—"Under the present system parties are not allowed to swear in civil matters in their own behalf; and a Bond as above directed seems much more likely to prove effective in answering the end proposed, than an oath would be."—No. 7086, D. C. *Colombo, N.* (M.)

June 20, (M. R. N.)

Appeal to the Privy Council—Review—Fresh Evidence.

214.—Where a judgment of the Supreme Court has been brought by way of review before the three judges collectively, previous to its going in appeal to the King in Privy Council, the appellant cannot be allowed to adduce fresh evidence in support of his case.—No. 6047, D. C. *Kandy*, (Coll.)

Collective Decision—Review.

215.—It may be doubted whether the first rule or limitation in cl. 52 of the Charter, was intended to apply to a case already heard before the three judges collectively at Colombo; for in such a case, the review in truth amounts to no more than a reconsideration by the same judges of the judgment already pronounced by them. But the Supreme Court *held* it to be the safer and more satisfactory course that the case should be again heard in review.—*Ibid.*

Evidence—Notice to produce.

216.—Where the defendant had, by his Answer, virtually denied the existence of a deed insisted upon by the plaintiff, the Supreme Court allowed parole evidence thereof, and *held* that the defendant had no right to object that he had not had notice to produce an instrument, which, if his own answer be true, it was impossible for him to produce.—No. 5276, D. C. *Kandy*, (M.)

Arbitration—Reference by parties to a suit.

217.—Where it was recorded in the proceedings that the parties had expressed themselves willing to abide by the decision of Arbitrators, the Supreme Court *held* that the losing party could not be allowed to object to their award; but recommended that in future wherever parties should agree to submit a matter for arbitration, their signatures to such consent should appear on the proceedings.—No. 1139, D. C. *Walligame*, (M.)

218.—The plaintiffs, as priests of a Mosque at Marendahn, in Barberyn, sought to recover from the defendants who were priests of another Mosque in the same village, damages in consequence of the defendants having celebrated at the latter Mosque certain religious festivals, the right of celebrating which the plaintiff's claimed as exclusively appertaining from time immemorial to their own mosque.

Moorish Mosque—

Held 1, That had the question related to the plaintiffs' right to celebrate these festivals at their own Mosque, there was sufficient evidence to shew the right from time immemorial; and the Supreme Court was bound to protect all classes of people in the free and undisturbed exercise of their religious rites and ceremonies.—2, Had the enquiry been of a purely ecclesiastical nature, *ex. gr.*, whether these festivals could, consistently with the Mahomedan religion, be celebrated in more than one Mosque, and whether the plaintiffs' Mosque was the favored one,—these would be questions which the Supreme Court was neither called upon, nor would consent, to decide; for, granting that the Mahomedan worship may have been scandalized, and the veneration due to the plaintiffs' Mosque abated by the practices and assumptions of the defendants, the Law did not recognize these as civil injuries for which compensation could be claimed in a Court of Justice; but they were matters purely ecclesiastical and the remedy, if attainable at all, was to be sought for in ecclesiastical censure or penance.—3, That the plaintiffs had no right to the voluntary offerings of the devotees. The assumed right admitting of no legal remedy in case of the offerings being refused or withheld, was in truth no right at all; and if it were no right, the present action seeking compensation for the disturbance or obstruction of it, fell to the ground.—4, That the case of tithes in England bore no analogy to the present case, tithes being not voluntary offerings, but a legal provision for the clergy which could not be legally withheld and was recoverable by the aid of the civil power.—No. 12348, D. C. *Caltura,* (M.)

Exclusive right of celebrating festivals.

Voluntary offerings.

June 24, (M. R.)

Breach of Promise of Marriage—Evidence.

219.—In an action for damages, on breach of promise of Marriage, the plaintiff had failed to prove any positive or direct promise, but it appeared that the banns of marriage had been duly published, and that both parties were present at the publication ; and the Supreme Court *held* that this circumstance alone would entitle the plaintiff to judgment.—No. 1134, D. C. *Caltura*, (M.)

Defendant in default. Evidence.

220.—A defendant who is in default is not entitled to go into evidence, except to disprove the evidence adduced by the plaintiff.—*Ibid.*

Seller and Purchaser—Completion of Transfer,—Payment of money.

221.—An Auctioneer is entitled to detain the purchase-money till the transfer is completed ; and the seller ought to be equally entitled to refuse that completion till the payment of the money. And where a dispute arose as to which act should take place first, the Supreme Court recommended that the signature to the deed and the payment of the money should take place simultaneously, and that the Auctioneer and the Seller should agree to meet at the house of the Notary at an appointed time for the performance of these mutual acts.—No. 4599, D. C. *Colombo*, (M.)

July 1, (M. R.)

Service-Parveny. Alienation.

222.—The Reg. No. 8 of 1809 is merely declatory of what the Law was at the time it was passed, and makes no alteration or new laws ; but some allowance should be made for persons alienating before the passing of that Regulation, since the very necessity which existed for such a declaration, shews that the law as it stood was imperfectly known.—No. 714, D. C. *Matura*, (M.)

Second Marriage—Administration of deceased wife's estate.

223.—The plaintiff sued his son, a minor, for opposing his second marriage, and without waiting for Answer, moved that the son might be ordered to withdraw his opposition, and on refusal of that motion appealed to the Supreme Court. The Supreme Court however *held* that, if the defendant was a minor, it became the duty of the District Court to protect his interests, and therefore ordered that it should forthwith call upon the

plaintiff to take out Letters of Administration to the estate of his deceased wife, or in default thereof, should grant administration to the Secretary or other fit person; and that until such estate has been duly administered, the plaintiff should be restrained from entering into a second marriage. The action was dismissed on the plaintiff's own statement that the defendant was a minor.—No. 1502, D. C. *Caltura*, (M.) Minor Children.

224—A District Court may award double costs against a party in the nature of a punishment for endeavouring to mislead the Court by his answers, under rule 29, sec. i. *Rules and Orders.* But it was doubted whether a District Court would be justified in imposing double costs merely because the action had been brought on insufficient grounds or even on no real grounds at all, unless such action were attempted to be supported by false statements made by the plaintiff in open Court.—No. 823, D. C. *Walligame*, (M.) Punishment for false statements. Unfounded action.

225.—Where it appeared that a plaintiff not having taken out administration was not entitled to sue, the Supreme Court referred back the case to the District Court, and ordered the plaintiff to take out Letters of Administration; and *per* Marshall, C. J.—"His doing so may probably prevent whatever decree may be passed in this case from being hereafter called in question by parties who might otherwise contend that they had not been duly represented."—No. 6583, D. C. *Colombo, S.* (M.) Administration pending the suit.

July 8.

226.—Where the plaintiff sued for damages on the ground that the defendant had asked him to a feast and had afterwards refused to associate or sit with him, and the defendant in his Answer tendered an assurance that he did not intend to insult or cast any reflection on the plaintiff. The Supreme Court (the Assessors dissenting) held that the defendant's answer constituted in itself such "honorable amends" as ought to have satisfied the plaintiff; and refused to give damages; and as to costs, condemned the defendant in all Honorable Amends—Costs.

the costs up to Answer, and the plaintiff in all the subsequent costs.—No. 1126, D. C. *Caltura*, (M.)

Postponement—Absence of Proctor.

227.—The absence of the Proctor is not a sufficient reason for a postponement, unless he be unavoidably absent, as from illness or other uncontrolable cause. And when a trial is postponed on such ground, it should be on payment of the costs incurred by the postponement.—No. 6105, D. C. *Colombo, S.* (M.)

July, 15, (M. R.)

Law—"District Order." Cattle-trespass.

228.—Where the District Court of Ruanwelle had awarded a fine on the owner of Cattle found trespassing on "Government works and esplanade," (though no damage was proved to have been sustained by the prosecutor;) and the District Judge, on reference, stated that the fine had been awarded according to a "District order, which had been in existence ever since Ruanwelle had been a military post;" the Supreme Court set aside the decree with costs, and *Held* that it could not recognize any authority except that of the Legislature; and that where there was no law on the subject in force in the place, the owners of cattle found trespassing could only be sued civilly for the damage which might be done, including any expense or reasonable charge for securing the animals;—*Held* also that the Reg. No. 9 of 1833 relates only to offences committed within the gravets of the towns therein enumerated.—No. 2578, D. C. *Ruanwelle*, (M.)

July 22, (M. R. N.)

Assent to a Sale of Lands.

229.—Where it was contended that the plaintiffs had given their assent to a sale of their property for the benefit of others, the Supreme Court *held* that the mere presence of the plaintiffs at the sale could not be considered a sufficient assent; and as to a verbal assent (which had been attempted to be established,) it was *held* insufficient, 1, because no consideration or motive had been proved for such assent; and 2, because by the Regulation No. 4 of 1817, such consent or promise should have been in writing and duly signed.—No. 1261, D. C. *Negombo*, (N.)

Presence at the Sale.

Reg. of Frauds and Perjuries.

230.—Where the defendant had engaged by bond to pay a certain sum of money on the 31st August 1826, and without any stipulation as to interest; *Held* that though the bond authorized the creditor, in default of payment, to recover the amount by sale of certain property, it might still be a question whether the plaintiff, not having availed himself of that power, had not a right to claim interest. [The question was not however decided, but the case was referred back to the District Court to take evidence of certain payments of interest alleged to have been made].—No. 1048, D. C. *Caltura*, (M.)

Interest—not stipulated for.

July, 25, (M. R. N.)

231.—A construction in the shape of a Boutique is not *land* within the meaning of cl. 5 of the Reg. No. 4 of 1827, or of the Reg. of Frauds and Perjuries (No. 7 of 1834,) and a transfer of such a construction erected on the land by the permission of Government, to whom the soil still belongs, and given up to the plaintiff by the defendant on receiving the expenses which he had incurred in erecting it, need not be on stamp or reduced to writing.—No. 964, D. C. *Jaffna*, (M.)

Transfer of a mere building.

Stamp.

Frauds and Perjuries—"Land."

232.—Where the appellant contended that as no damages had been awarded against him in a case for libel, he was not liable to pay costs; *Held* that this was by no means a necessary consequence. The defendant had called the plaintiff his *slave*, and if he could not prove his legal claim to the person so designated, the plaintiff ought to be indemnified the expenses to which he had been put in contradicting the assertion.—No. 788, D. C. *Matelle*, (M.)

Damages—Costs. Action for Libel.

July 29, (M. R. N,)

233.—Where a plaintiff had established the greater part of his claim to the satisfaction of the District Court, the Supreme Court *held* that there seemed to be no reason why he should be condemned to bear his own costs.—No. 333, D. C.

Costs.

General Hypothec of Government.

234.—The Government possesses a general hypothec over the property of its debtors, and has a right to prevent all alienations of such property; but this right does not commence till the debt has actually accrued due; except in an extreme case, as where a party is endeavouring to alienate his property obviously with the fraudulent intention of defeating a debt about to become due.—No. 6975, D. C. *Kandy*, (M.)

Witnesses—Court bound to hear, when.

235.—Where the plaintiff has failed in establishing his case, it is unnecessary to hear the defendant's witnesses, unless sometimes for the greater satisfaction of the Court; but where the plaintiff's case is proved on his part, however clearly and even unanswerably, the defendant is nevertheless entitled in his turn to have his witnesses examined, except where his answer is such as, if proved, would afford no defence to the action.—No. 1160, D. C. *Caltura*, (M.)

August 12, (M. N.)

Magger, Kaycooly, &c., when recoverable.

236.—Among Mahomedans, on the death of the husband or upon a separation, the wife and, after her death, her children, are entitled to recover from the husband, or his representatives, her *Magger, Kaycooly*, &c.—No. 7487, D. C. *Jaffna*, (N.)

Stamp.

237.—Where the defendant claimed the *whole* amount of several items specified in a *Cartom*, but her claim for *Magger*, the principal item, rested on other and sufficient evidence, independant of the *Cartom* (viz. the admission of the plaintiff in his libel and the testimony of one of her witnesses,) and the stamp on the *Cartom* was sufficient to cover the *residue* of her claim, *Held* that the *Cartom* was admissible in respect of such residue, though insufficiently stamped as regards the whole of the claim.—*Ibid.*

August 26, (M. R. N.)

Trespass—Title of Plaintiff.

238.—Where the plaintiff sued for a trespass or encroachment on land; and it appeared that the land belonged to Government; but the plaintiff offered to prove that he had a right to apply to Government for the land; *Held* that his action

had been properly dismissed, as the trespass or encroachment, if any had been committed, was an injury done not to him, but to Government, and any claim the plaintiff might have on the bounty of Government would be in no way affected by a decree passed in the District Court on the subject of a trespass committed on land which did not belong to him.—No. 400, D. C. *Caltura*, (M.)

Breach of Promise of Marriage—Costs.

239.—Where the plaintiff succeeds in an action for breach of Promise of Marriage, she should be allowed her costs. The defendant might have prevented any costs being incurred beyond those of the libel and summons, by admitting his engagement and offering to pay such moderate damages as the Court might award.—No. 1134, D. C. *Caltura*, (M.)

Appeal to Privy Council — Value of the property.

240.—Where the value of the property in dispute in a case did not appear in the proceedings had therein, but the appellant alleged that it exceeded £500, the Supreme Court, previous to sitting in review on appeal to the King in Privy Council, ordered that the District Court of Kandy should ascertain by Commissioners or by other satisfactory means, the value of such property, and report to the Supreme Court thereon.—No. 646, D. C. *Kandy*, (R.)

September 2, (M. R N.)

Dowry—Collation.

241.—Where one daughter had received in dowry a half of all the disposable estate of the parents, the Supreme Court, after consulting the Assessors, (who stated that by the customary law of inheritance among the Cinghalese, having received such a large portion as dowry, she could not claim another share at her mother's death, and that the remaining half ought to devolve on the other child,) referred the case back for the opinion of the District Court on this point on more mature consideration, and after consultation with those best acquainted with the Cinghalese Law of Inheritance.—No. 603, D. C. *Caltura*, (M.)

Sept. 23, (M. R. N.)

Stamp—When necessary.

242.—Under the Stamp Regulation, it is not necessary to the legal validity of any contract, &c.,

that it should be reduced to writing, further than is made necessary by other laws and regulations; but only that *if* reduced into writing, such written contracts, &c. should be stamped.—No. 489, D. C. *Tenmoratchy*, (M.)

Sept. 28.

Costs—Interlocutory Appeal.

243.—Where the Supreme Court, on an appeal by the defendant, had set aside the interlocutory order appealed against, and referred the case back for re-hearing, but made no direction as to costs; and the District Court, after re-hearing, had given final judgment against the defendant with costs; *Held* that the costs of the appeal against the interlocutory order followed the general decree of costs awarded against the defendant by the final judgment.—No. 955, D. C. *Caltura*, (M.)

Sept. 30, (M. R. N.)

Injury to Character.

244.—A plaintiff who complains of an injury done to his character, has as much right to the time of the Court, as one who seeks to recover property or redress from any other species of injury.—No. 7403, D. C. *Kandy*, (M.)

Marriage-Contract—Damages.

245.—The plaintiff having failed to shew any damage sustained in consequence of a breach of a Marriage-contract, beyond the cost of the stamp on which the contract had been drawn, for which however he had brought a separate action; *Held* that his suit had been properly dismissed.—No. 604, D. C. *Trincomalie*, (M.)

Claim for Penalty and Expenses.

246.—A claim for the specific penalty imposed by a Marriage-contract and any further claim for the expenses to which the party may have been put in consequence of the non-fulfilment of it, may be joined in the same action.—*Ibid.*

Assent to Marriage Contract—implied.

247.—Among Mahomedans, even supposing the assent of the Bride's brother to be necessary for the validity of the Marriage-contract, such assent may be implied from his having been present at the execution of it, his making no objection to it, and his serving out cakes to the people after its execution.—*Ibid.*

248.—The non-payment of the purchase-money to the Fiscal within the stipulated time, does not entail an absolute forfeiture, but merely subjects the purchaser to the risk of a re-sale at the option of the Fiscal.—No. 2563, D. C. *Ruanwelle*, (N.) Fiscal's Sale—Default of Purchaser.

October 7, (M. R. N.)

249.—The possession required by the Reg. No. 5 of 1819 should be established to the satisfaction of the Court, not by the naked affidavit of the party, but by that sort of proof which would satisfy the Court that he really did possess the land at the time, either by actual occupation or cultivation, or by the exercise of those acts of ownership which, according to the nature of the property, denote possession. And as to the Citation, it should be shewn to have been published with a degree of notoriety—of actual obtrusion on the notice of the neighbourhood—that should make it almost impossible to plead ignorance of it.—No. 2354, D. C. *Chilaw*, (M.) Edictal Citation—Possession how established. Citation how published.

250.—The certificate of a Proctor that the alleged pauper has a good ground of action is absolutely necessary.—*M. Cadergamer* v. *Jyaati*, D. C. *Wadimoratchy*, (M.) Pauper—Certificate of Proctor.

Oct. 10.

251.—The sums actually paid by a party for getting his pleadings drawn by private persons, were directed to be allowed at the taxation of his bill, provided no Proctor had been employed, and such sums, if in the 1st or 2nd class, did not on the whole exceed ten per cent. on the sum decreed.—No. 584, &c., D. C. *Amblangodde*, (M.) Pleadings drawn by private parties.

Oct. 14, (M. N.)

252.—It is a sufficient ground for dismissing the claim of the plaintiffs, that they admit their inability to state who are the joint heirs with themselves or to point out the portions to which the plaintiffs are respectively entitled.—No. 124, D. C. *Amblangodde*, (M.) Dismissal—Grounds of.

253.—The Civil Law, in order to prevent unnecessary multiplicity of suits, allows any person Intervention

having an interest in the subject-matter between litigants, to become a party to a suit already instituted. And this privilege is recognized and declared by rule 32 of sec. i, *Rules and Orders.*—No 1465, D. C. *Caltura,* (M.)

Defective Libel—Examination of Defendant.

254.—Where a defendant applied that the plaintiff should be called upon to state what injury had been committed by each defendant individually, the Supreme Court *held* that that object was equally and satisfactorily attainable by the examination of the plaintiff in Court.—No. 1784, D. C. *Caltura,* (M.)

Planting-share. Joint ownership. Right of Pre-emption.

255.—A decree reserving a planting-share to the defendant, confers to a certain extent a joint right of ownership upon him; nor has the plaintiff any right to insist on buying out the defendant's share, unless by way of pre-emption, provided the defendant is willing to part with it.—No. 2692, D. C. *Galle,* (M.)

Oct. 28, (M. R. N.)

Costs.

256.—A plaintiff who succeeds in the main object of his suit is entitled to his costs, unless it be shewn that the action was frivolous or needless.—No. 2226, D. C. *Chilaw,* (N.)

D. C. cannot rescind its own order.

257.—A District Court cannot rescind an order once made, but may refer the matter to the Supreme Court.—No. 1859, D. C. *Caltura,* (M.)

November 11, (M. R. N.)

Namptissement—

258.—The right to *Namptissement* forms part of the Roman-Dutch Law and should obtain wherever that Law is administered, though not noticed in the Rules of Practice of 1833.—No. 8423, D. C. *Colombo, N,* (Coll.)

Merchant's Day-book—Provisional Judgment.

259.—A Merchant's day-book, containing an account of the goods sold and delivered, is a document on which provisional judgment may be demanded; and though the Roman-Dutch Law requires that it should be supported by the oath or strengthened by the death of the merchant, yet, if the merchant be living but cannot under the Rules take an oath in his own suit, his examination under penalty, as directed by rule 2?, sec. i, is fully equivalent to the oath.—*Ibid.*

260.—A Merchant's account of goods sold and delivered, though containing "mention concerning the time of payment," viz., "at two equal monthly instalments," was held admissible in evidence under cl. 9 of the Reg. No. 4 of 1827, there being nothing to shew that the mention of the time was intended to be binding on the defendant; and the account not having been produced with any such view.—*Ibid.*

Stamp—Account, containing "mention of the time of payment."

261.—Where a defendant contended that with one exception, there was not a single instance in which a particular provision allowed by the Dutch Law had been demanded in any Court of Justice, since the cession of the Island; *Held* that if the right exists, it is not the less Law because hitherto suitors may not have known of its existence, or may not have thought it expedient to exercise it.—*Ibid.*

Rights under Roman Dutch Law—Non-exercise of.

262.—Where the defendant had charged the plaintiff with having removed a quantity of Government salt to his own house, and, after calling evidence, had failed to substantiate the charge, though it was not stated whether the charge implied a mere infraction of the Reg. No. 2 of 1818, or whether theft had been attributed to the plaintiff; *Held* that the plaintiff had an action for damages.—*Boetsz* v. *Morays*, D C. *Chilaw*, (M.)

Malicious Prosecution.

263.—The requisites of an action for a Malicious Prosecution, are 1, that the charge must have been false; 2, there must have been a want of probable cause to justify the accusation; 3, there must have been malice on the part of the informant, (and the Law implies malice where no probable ground is shown;) and 4, the plaintiff must have sustained damage, either in his person or reputation, or by pecuniary loss. In the above case (§ 262) it was *held* that it was for the defendant to negative the first three requisites.—*Ibid.*

Action for Malicious Prosecution—Requisites of.

264.—Where a person has been actually brought to trial for any offence, the conviction of which would be injurious to his character, whether as a member of society, or with reference to his profession, occupation or office, it is not suffi-

Malicious Prosecution—Reparation.

cient reparation for that attack on his character that the want of evidence, or in other words, the want of probable cause, has rendered it unsuccesful.—*Ibid.*

Decree—Third parties.

265.—A decree, though binding on the plaintiff and defendant in a suit, does not affect a third party; for otherwise no man's title would be secure; since it would be an easy matter for knaves to collude together, and the one as defendant suffer judgment to go by admission or default in favor of the other as plaintiff, neither party perhaps possessing a shadow of rights.—No. 1584, D. C. *Seven Corles*, (N.)

Duty of Purchaser.

266.—A purchaser ought to enquire into the seller's right before he accepts a deed of sale; and he would then either discover the want of title in the seller, or be prepared to maintain it when questioned.—No. 5486, D. C. *Colombo, N.* (M.)

Liability of Wife—at *Batticaloa.*

267.—A case was referred back to the District Court of Batticaloa for information whether, by the customary law of that place, the property of a wife who had been separated from her husband and was actually living a part from him at the time when judgment was recorded against him, would be liable for his debts.—No. 2912, D. C. *Batticaloa*, (M.)

Costs—Several plaintiffs.

268.—Where judgment having been given for the defendant with costs, it appeared that the first and second plaintiffs in the suit had acted without fraud, and had purchased the property in question from the third plaintiff on the supposition that the latter was legally entitled to dispose of it; the Supreme Court deceed that the third plaintiff alone should pay the costs, unless she could shew good and sufficient cause to the District Court why the first and second plaintiffs should be obliged to pay any part thereof.—No. 3200, D. C. *Matura*, (M.)

Nov. 18, (M. R. N.)

Answer—General Denial.

269.—The facts on which a defendant intends to rest his defence ought to be stated in his Answer. Where on an action for a share of the produce of a field cultivated by the defendant, the

defendant put in a general denial of all right on the part of the plaintiff, but at the trial went into evidence of particular facts, which if true might have furnished a defence to the claim, though they admitted the plaintiff's title, the District Court gave judgment for the plaintiff, and the judgment was affirmed by the Supreme Court.—No. 363, D. C. *Manar*, (M.)

Evidence.

270.—Where a defendant, instead of resting on the plea of prescription, had admitted the instrument and pleaded payment, which however he failed to prove; *Held* that the District Court could not change the ground of defence and substitute the *presumption* of payment raised by the Ordinance, for the *actual liquidation* which the defendant had undertaken but failed to prove.—No. 1117, D. C. *Caltura*, (M.)—See also Dec. 2, 1835, Civ. Min. p. 706.

Prescription—Payment.

271.—Though the positive law of Prescription, not having been pleaded, cannot be insisted upon, it is still a question for the District Court whether, putting that law aside, the Court may not feel convinced, from the lapse of time which had been suffered to elapse, that the instrument has been in some way satisfied.—*Ibid.*

Presumption of Payment from lapse of Time.

Nov. 25, (M. R. N.)

272.—The defendant as Auctioneer having sold certain lands at an auction to the plaintiff, had recovered from the plaintiff the amount of stamps and other expences necessary for the transfer, and afterwards called on the plaintiff to pay over the purchase-money to the vendor, promising to get the title for the plaintiff in a month. The purchase-money was accordingly paid to the vendor but no title was ever made out; and it turned out that the vendor had really no title, and the plaintiff was ultimately ejected from the land by the lawful owner. On an action by the plaintiff against the defendant, the auctioneer; *Held* that the latter was liable to refund to the plaintiff, not only the amount paid to himself for expenses &c., but also the purchase-money paid at his request and by his direction (and *per* MARSHALL, C. J.,—on his promise of procuring

Liability of Auctioneer.

the title) to the vendor.—No. 411, D. C. *Colombo, S.* (Coll.)

Claim under Edict. Citation.

273.—A claim under Edictal Citation may be made at any time before the Certificate of the District Court is granted; for claims ought to be received as long as the application is kept open, whatever may be the day mentioned in the citation and although the application is suspended in order to await the decision upon other claims.—No. 976, D. C. *Amblangodde*, (M.)

Certificate of Quiet Possession—Force of.

274.—The only force which ought to be given to Certificates of Quiet Possession, as obtained under the Reg. No. 5 of 1819, is the arriving at the fact that the neighbourhood has been cited in a certain manner to come forward with claims, and that for a certain number of months none had been made. This fact would no doubt assist a party in proving title by prescription or in any other way founded on possession; but it would not and ought not to be held conclusive against subsequent claimants, if they can account satisfactorily for their silence during the time the Citation was pending.—*Ibid.*

Pauper—Proof within reasonable time.

275.—A party applying for permission to sue as a pauper is entitled only to a reasonable opportunity of establishing his poverty; but at the same time there ought to be some limit to the length of investigation into the value of his property, and the District cannot be required in every case of contested pauperism to enter into a trial of title to land.—No. 1238, D. C. *Negombo*, (M.)

December 2, (M. R. N.)

Order on a Shroff—Evidence of payment.

276.—In an action by the plaintiff (a Government Servant) against a Shroff of the Cutcherry, the defendant produced a slip of paper containing the following order from the plaintiff:—"Private Account.—Shroff, I want £30 in £10 notes. Kandy, 3rd April, 1835.—G. Turnour." *Held* that this was a mere requisition which might or might not have been complied with, and that the bare production of it, though furnishing a strong presumption, was not conclusive proof of the

plaintiff having received the amount, unless endorsed by him as having been received; and this, notwithstanding the course of dealing between the parties, by which it appeared that other sums of money had actually been received by the plaintiff on similar documents.—No. 7154, D. C. *Kandy*, (M.)

Commission on a deposit.

277.—Where the defendant, a Shroff of the Cutcherry, claimed a commission of one-half per cent on sums held by him for the plaintiff, a Government servant; *Held* that in the absence of any express agreement, he was not entitled to such commission; because the chief consideration on which the right of a Merchant or Banker (to whom a Shroff was contended to be analogous) to commission is founded, was wanting in the case, viz. the expense of providing a place of safe custody and other incidental expenses, and the risk of loss; the expense being in the present instance borne by Government, and the risk nothing, the defendant having availed himself of the place of security which his office left at his disposal. And although the Government had declared that it would not be responsible for private deposits, it does not follow that the defendant, a mere depositary, would have been liable, if any loss, not arising from gross negligence, had happened.—*Ibid.*

Liability of Depositary for Loss.

Judgment binding on Heirs.

278.—A Judgment pronounced against a party is binding on his heirs. Where a previous decree had been given against a father, and it appeared that the subsequent action was, to all practical purposes, for the benefit of his heirs, it was held to be but a revival of the former suit, and therefore not maintainable.—No. 349, D. C. *Caltura*, (N.)

Right to Administration.

279.—A Brother has at least as good a claim to Administration as a Sister. She cannot however claim sole administration to the exclusion of her Brother.—No. 42, D. C. *Galle*, (M.)

Default, after issue joined.

280.—Where the defendant had committed numerous defaults after issue joined; *Held* that the District Court would be perfectly justified in proceeding to hear the case with the least possible delay, giving notice of the different steps taken

by personal service on the defendant, if he could be found, or else by leaving the notices at his last place of abode.—No. 11969, D. C. *Ruanwelle*, (M.)

Dec. 9, (M. R. N.)

Right of Resumption on non-payment of price—

281.—Where a party had sold certain articles to the defendant, subject only to resumption by the seller on non-payment of the balance of the purchase-money within a certain time; and it appeared that he had not exercised this right, but contented himself with the verbal undertaking of a third party to pay the amount due, (though upon what consideration it did not appear;) *Held* that this agreement was a waiver of the right of resumption, and left the defendant the absolute proprietor of the articles.—No. 1735, D. C. *Kandy*, (M.)

Waiver of.

Appeal *in forma pauperis*.

282.—Where a plaintiff, a Buddhist Priest, applied to be admitted to appeal *in forma pauperis*, and it appeared that he held certain deeds of lands in his name, which lands were however stated to be held in trust for a Temple; *Held* that, if the purchases had been in trust for the Temple, that ought to have been inserted in the deeds; and that as no such trust did appear, the applicant should be considered as the proprietor to all intents and purposes;—*Held* also that the question whether the deeds being in the party's name were a contravention of the rules of poverty prescribed by his religion, was one which could not affect the case.—No. 32, D. C. *Matura*, (M.)

Property held as Trustee for a Temple.

Administration refused to a Buddhist Priest.

283.—Upon application for Administration by a Buddhist Priest, it was *held* that the District Courts are to compel all administrators, and even executors, according to the Charter, if they see reason to do so, to find security for the due execution of their offices, and that nothing could be more at variance with the spirit of this highly salutary provision, than to allow a person to administer, who is avowedly a pauper, and for whom therefore, especially if he cannot legally possess property, no solvent person can reasonably be expected to give security.—*Ibid.*

Dec. 16, (M. N.)

284.—It is the duty of the Supreme Court to correct any errors in the judgments of District Courts; but it has no discretionary authority to alleviate those hardships which a strict enforcement of the Law will sometimes produce, further than the District Courts themselves possess that power.—No. 115, D. C. *Manar*, (M.) S. C. how far entitled to interfere with decrees.

285.—The fact that a party had for many years taken up his residence with his grand-daughter, and had openly declared her to be sole heiress to his property, and had even executed an instrument to that effect (which however, having been informally executed, was invalid in law,) is not sufficient to give her any right of succession to the whole property of the grand-father, to the exclusion of the other legitimate heirs.—No. 972, D. C. *Trincomalie*, (N.) Right of Succession.

286.—The following forms employed by the Supreme Court upon a reference to Arbitration made by the parties to a suit, may be considered useful. The parties having subscribed to a document in the following form:— Reference to Arbitration.

"We, the undersigned A. B. (for myself and on behalf of the other plaintiffs,) and C. D. (for myself and on behalf of the other defendants,) do hereby agree and consent that all matters in dispute in this case, (that is, whether &c.) be refered to the award and final determination of E. F. and G. H. And we do bind ourselves to abide by the award and decision of the said Arbitrators:" Form of Agreement to refer.

The Supreme Court made the following order thereon:—

"It is ordered, by and with the consent of the plaintiffs and defendants in this case, that all matters in difference between the said parties be referred to the award, order, arbitrament, final end and determination of E. F. and G. H., Arbitrators nominated by the said plaintiffs and defendants, so as they the said Arbitrators shall make and publish their award in writing of and concerning the matters in question, on or before the ——— day of ——— or on or before such further or ulterior day as the said Arbitrators shall Form of Reference.

ultimately appoint and signify in writing under their hands, to be endorsed on these presents.

" And it is further ordered, by and with such consent as aforesaid, that all differences which may arise between the said Arbitrators be referred to the decision and umpirage of this Court upon a statement of facts made by the said Arbitrators.

" And it is likewise ordered, by and with such consent as aforesaid, that the costs of this cause and of the said reference to the Court or in any manner relative thereto shall abide the event of the said award and decision or umpirage.

" And that the Plaintiffs and Defendants respectively may be examined, if thought necessary by the said Arbitrators, and shall and do produce before the said Arbitrators all papers and writings touching and relating to the matter in difference between the said parties, as the said Arbitrators shall think fit, and that the Witnesses of the Plaintiffs and Defendants respectively shall be examined upon oath also, to be sworn before the said District Court.

" And it is lastly ordered by and with such consent as aforesaid, if either party shall by effected delay or otherwise wilfully prevent the said Arbitrators or either of them from making an award, he or they shall pay such costs to the other as this Court shall think reasonable and just.—No. 2939, D. C. *Amblangodde*, (M.)

Remuneration for Medical Services.

287.—In an action for Medical Services rendered by the plaintiff, it was contended by the defendant that the plaintiff should be satisfied with the same sum which it appeared the defendant had been in tne habit of paying the plaintiff's father yearly. But the Supreme Court *held* that although this mode of remunerating medical attendance by a stipulated amount was very common, yet a contract to that effect must be shewn to have been expressly entered into and to be reciprocally binding upon both parties, before it could be insisted upon; nor, if entered into by the Father, would it necessarily follow that the Son would agree to the same terms as the father.—No. 6875, D. C. *Colombo, S.* (M.)

Contract.

288.—A plaintiff, though only acting in trust for others (executors of an estate,) was *held* entitled to sue in his own name for monies which he had paid over to the defendant for greater security. The defendant had in his answer denied the plaintiff's right to sue for money belonging to other parties, and averred that he should have had a good ground of defence to an action by the executors; *Held* however, that there was no reason why the defendant should not have made any defence to this action which he might have against the executors' right to recover; and judgment was allowed for the plaintiff. But the only evidence of the payment of the money to the defendant being his own admission, the Supreme Court allowed him an opportunity of establishing his defence by ordering that the money to be recovered from him should lie in deposit in the District Court for 14 days, and that if no proceedings be instituted by him against the executors within that time, it should be paid over to the plaintiff.—No. 6863, D. C. *Colombo, N.* (M.)

Action for money belonging to third parties. Deposit.

Defence.

289.—All infraction of the Revenue Laws, on which penalty, fine, or other description of punishment whatever is imposed, should be proceeded against criminally. See Charter, cl. 28.—No. 98, D. C. *Colombo, S.* (M.) And see *Dec.* 23, 1835, Civ. Min. p. 761.

Infraction of Revenue Laws.

290.—Confiscation is rather in the nature of a civil action than of a criminal prosecution.—*Ibid.*

Confiscation.

291.—It would be impossible to lay down any general rule as to how often a case may be postponed on account of the absence of a material witness. This is a matter which must be left to the discretion of the District Court under the conditions imposed by the Rules and Orders, and subject to appeal in any case in which a party may consider that the indulgence has been unjustly granted or refused.—No. 2502, D. C. *Ruanwelle,* (M.)

Postponements.

Dec. 23, (M. R. N.)

292.—The Supreme Court would be unwilling to leave a party in a state of destitution at the

Rights of Children.—

Destitution of the Parent.

suit of her children; but if the latter insist upon their right, that right must be enforced, however harsh the proceeding may appear. If however the customary law of the district would give her any right to the occupancy of the land claimed, during her life, on the ground of her relationship, her poverty and of her having been allowed to continue for so many years to reside upon it, the Court would gladly sanction a decree which would secure her from being turned out of the land.—No. 1613, D. C, *Wallegame* (M.)

Dec. 30, (M. N.)

Stamp—Acknowledgment of a balance.

Letters—Collateral Evidence.

293.—A document acknowledging a balance to be due on settlement of account, was held admissible in evidence under cl. 9 of the Reg. No. 4 of 1827 (and conclusive against the party signing it,) for the collateral purpose of shewing what the balance was, though it could not have been received in evidence, if attempted to be enforced as a Promissory Note. So a letter would be admissible if produced not for the purpose of enforcing it as an agreement but to increase by its collateral evidence the probability of any fact having taken place.—No. 4099, D. C. *Colombo, S.* (M.)

Assignment of a debt.

Former Transactions.

294.—After a debtor has admitted a specific sum to be due by him on settlement of accounts, and after that debt has been assigned over on good consideration to a third party, the debtor is not at liberty to rake up old transactions of many years standing, and to bring forward admissions of the original creditor, so as to affect the assignee of the debt. And even if no assignment of the debt took place, and the action is between the original parties, the strongest evideuce would be required to rebut the solemn acknowledgment of a debtor.—*Ibid.*

January 6, 1836.

295.—Where an Executor or Administrator pleads a false plea, he is liable to the costs out of his own property.—No. 565, D. C. *Manar*, (M.) Costs against an Executor.

296.—The Island is divided, by the Proclamation of the 1st October 1833, into *Provinces* as regards Revenue matters. It is divided by the Charter into *Circuits* and the *District of Colombo*, and again by the Proclamation sub-divided into *Districts* as regards the administration of Justice. It is the judicial division of *District* and not the Revenue division of *Province*, which must decide the question of jurisdiction.—No. 2432, D. C. *Trincomalie*, (M.) Divisions of the Island into Provinces, Circuits, and Districts. Jurisdiction of District Courts.

297.—Where one of two defendants in a suit was the Judge of the District Court in which the suit had been instituted, the Supreme Court ordered the case to be transferred to the Court of an adjoining District (Trincomalie); which, under cl. 24 of the Charter, was held competent to entertain the case as against that defendant, and having been elected by the plaintiff as one of the districts immediately adjoining, was bound to hear and decide it, unless some very strong reason should be shewn for transferring it to another Court.—*Ibid.* Transfer of a case, where the Judge is a party.

298.—Where possession has been enjoyed for many years uninterruptedly and without contest, the title or right of possession becomes in fact an adverse one against all the world; because as no body has disputed it, the law presumes that the possessor has a better right to it than any other, even though he has not a single paper or document to shew in support of his title. And this is the very essence of a Title by Prescription.—No. 1652, D. C. *Negombo*, (M.) Possession—Adverse title.

299.—Where a Proctor has not been employed *as a Proctor* in the particular business which forms the subject of the enquiry, he is not inad- Proctor,—when competent as a Witness.

missible as a witness, even though he may have been consulted confidentially: and the reason is that any disclosures made to him by the party were not made to him as his proctor, in which character alone, viz. as the retained counsel or proctor, the obligation to secrecy exists.—*Ibid.*

Interpreter—Opinion and Evidence of.

300.—The opinion of an Interpreter of the Court is the best that can be obtained as to the precise meaning of words and expressions in a native deed. But his opinion, as Interpreter, can scarcely be received as matter of inference that "if the plantation alone had been intended in a deed, the deed ought or would have specified the plantation," for this is a matter not so much of interpretation of languages as of law or custom. If he is sufficiently acquainted with the custom to give evidence of it, he may be asked, not as Interpreter, but as a witness, what the custom of the country is with respect to the wording of deeds in distinguishing between ground-share and planter's-share.—No. 7991, D. C. *Colombo, N.* (M.)

Evidence to discredit a Witness.

301.—A deed should not be received in evidence for the purpose of discrediting a Witness. The rule on the subject is, that the general character only of a witness may be enquired into, but not particular facts or occurrences; because every man may be supposed capable of supporting his general character, though he may not be prepared to answer to particular facts, not in issue, and of which therefore he would have no notice.—No. 11371, D. C. *Colombo, S.* (M.)

Jan. 13.

Sale of mortgaged property—Opposition by the Creditor.

302.—It by no means follows that because a creditor did not assert his right, at a Fiscal's sale, so earnestly as he might have done, he has forfeited his right to recover the debt due on a mortgage of the land sold.—No. 2507, D. C. *Chilaw,* (M.)

Amendment of Libel.

303.—A plaintiff is entitled to amend his libel, provided the proposed amendment be such as, if introduced in the first instance, would not have rendered the libel inadmissible. As it would be

no objection to the reception of a libel in the first instance that it includes both principal and interest, so there is no reason why the plaintiff should not be allowed to add his claim for the principal to one originally made for interest, without subjecting the parties to the expense of a double action.—No. 6776, D. C. *Colombo, S.* (M.)

Adopted Children, joined as Administrators.

304.—In a case from Ratnapoora, where the fact of the adoption of certain children had been proved to the satisfaction of the Court; *Held* that there was no good reason why the adopted sons should not be joined with the widow in the administration of the husband's estate.—No. 4, D. C. *Ratnapoora,* (M.)

Jan. 20, (M. R.)

Claim founded on a Sale and Possession—Variance.

305.—Where the plaintiff, a Buddhist Priest, claimed a certain field, by virtue of a sale and of uninterrupted posseession on the part of the Temple from the time of such sale; and the evidence adduced in the case only proved a constant possession by the alleged vendor and the defendant, but paying *anda* to the Temple; *Held* 1, that if the plaintiff had rested his claim to the *anda*-share alone on the prescriptive right acquired by long payment, he might probably have been entitled to a continuance of that payment; but as he had founded it on a sale and on uninterrupted possession (neither of which had been satisfactorily proved,) the action should have been dismissed; but *held* 2, that the defendant having admitted that *anda* was due to the Temple, and that he had tendered thirty *ridies*, which had been refused, the field was liable to the extent of that admission, but no further; and that the property in the field should be declared to be in the defendant, and, after payment of the thirty *ridies*, it should be exempted from the payment of the *anda*-share.—No. 747, D. C. *Ratnapoora,* (M.)

Admission by defendant.

Proof of an Instrument.

306.—The bare production of an instrument, unsupported by proof, amounts to nothing at all. —*Ibid.*

Stamp duty—

307.—The Procl. of the 25th March 1824 has been virtually repealed, at least as regards the first six clauses of it, by cl. 56 of the Charter, taken in

Exemption in favour of Temples.

connection with the order of the Supreme Court of the 1st October 1833, establishing the table of Stamps to be levied in District Courts, and in which no exception is made in favour of Temples and of those appearing on behalf of Temples.—*Ibid.*

Jan. 27, (M. R.)

Rules of Practice.

308.—The Rules of Practice were never intended to provide for every possible emergency or for every collateral step which might become necessary in the progress of a suit.

Value of the property in suit, how ascertained.

Where the value fixed by the plaintiff on the property in dispute, is contested by the defendant, the practice of the Courts has always been to allow a Commission to appraise the property; and it by no means follows that because this course is not expressly provided for by Regulation or by the Rules, it cannot be legally adopted. —No. 1982, D. C. *Caltura,* (M.)

Appeal *in forma pauperis*—Provision as to future costs.

309.—Where a defendant, as appellant, succeeded in appeal, (the plaintiff proceeding as a pauper,) it was ordered that in case of the plaintiff obtaining a decree in his favour in the Court below, the costs incurred by the defendant in his appeal should be deducted out of the costs which might be awarded to the plaintiff.—*Ibid.*

February 3, (M. R. N.)

Rights of the Government—Objection by a third party.

310.—The objection that the property claimed by a party is *Ratmahare* land, is an objection for the Government, and not for a private party, to urge.—No. 2563, D. C. *Ruanwelle,* (N.)

Right of re-selling, on default of the purchaser.

311.—The condition as to the creditor's *option* to insist on a resale in case of default in the payment of the purchase-money, cannot be taken advantage of in the way of redemption by the debtor, who forfeits all title to the land from the moment of sale if not of seizure in execution, far less by a person who is a mere claimant through the debtor.—*Ibid.*

Confiscation—Delay on the part of Govt. Officers.

312.—On an appeal against a decree confiscating a dhoney, it appeared that the vessel had arrived at Calpentyn in September 1834, and that the action had not been brought until October

1835. The only excuse alleged for this delay was that the plaintiff (the Custom-master of Calpentyn) had waited till he was furnished with a copy of the Manar port-clearance. *Per* MARSHALL, C. J.—"The Supreme Court can scarcely suppose that the plaintiff was serious in assigning as a reason for twelve months' delay in the execution of his duty, the want of a document which it must be presumed might have been procured with the greatest ease in a week. The Crown, it is true, is not bound by the ordinary rules of Prescription; but it is the duty of the Courts of Justice to enquire into any apparent neglect on the part of the Officers of Government, by which hardship or injustice may be done to those who are prosecuted for breach of the Revenue Laws. And both hardship and injustice must be inflicted by any unnecessary delay in the institution of such prosecutions. Unless therefore it can be shewn that the plaintiff was prevented by some cause over which he had no controul from procuring the port-clearance within a reasonable time, the S. C. will feel it to be its duty to recommend to the Government a remission of the confiscation, even if the defendant should fail in establishing a good ground of defence."—No. 2547, D. C. *Chilaw*, (M.)

Feb. 6, (M. R. N.)

Right of Re-entry, how enforced.

313.—The right of re-entry, on the ground of non-cultivation can only be enforced by a Court of Justice on proof of such neglect; and, as regards Crown-lands; *Held* that if the Government had determined on resuming possession on the ground of non-compliance with the conditions of the original grant, such resumption would not be presumed, even where it appeared that the Government-share had never been paid; but should be proved to have been made in a public authentic shape, and recorded in the Court by which it had been adjudicated.—No. 6715, D. C. *Colombo, S.* (M.)

Dereliction of Cinnamon-grounds.

314.—The abandonment of Cinnamon-grounds, during the time when the cultivation or destruction of Cinnamon was prohibited by Government, does not operate as a dereliction of all future right

to the land, so as to preclude the owner from reclaiming it from Government on the abolition of such exclusive right.—*Ibid.*

Marriage Illegitimacy.

315.—It was urged in appeal, that the plaintiffs, who claimed certain lands as the children of A. appeared, according to a Thombo-extract produced in the case, to have been born out of wedlock; but this objection not having been taken in the Court below, the Supreme Court refused to entertain it, and *held* that, even if it had been so taken, the answer would have been that half the natives in the Island might probably be dispossessed of their property, if it were necessary for them to shew a regular marriage between their parents. —*Ibid.*

Government Proclamation.

316.—The effect of an Advertisement or Proclamation by Government would depend on the terms of it, on the degree of publicity given to it, and on the effect it might have produced on the public in general.—*Ibid.*

Prescription—Possession by Crown of Cinnamon-grounds.

317.—Where the Crown had the right to take the cultivation of Cinnamon-land into its own hands exclusively, and the owner of the soil, as he could in no way interfere with, or impede such cultivation, ceased at length to derive any advantage whatever from the naked right of possession; *Held* that an occupancy by the Crown under such circumstances, was not that species of possession which the Law of Prescription contemplates, and which presumes a voluntary acquiescence on the part of the claimant —*Ibid.*

Matrimonial Jurisdiction.

318.—The District Courts have jurisdiction over matrimonial causes and possess the power of dissolving a Marriage. The words " all suits" in cl. 24 of the Charter, comprehend matrimonial causes as well as others; it having been the intention of those who framed the Charter to confer the most extensive jurisdiction on the District Courts in all but criminal matters of a grave nature, and a matrimonial jurisdiction among others. [*Qu.* whether the District Courts have the power of granting a divorce, when the parties belong to another nation or hav e married in a

foreign country ?] With respect to the Supreme Court exercising this jurisdiction, *Held* that as the above clause does vest it in the District Courts, it must be exercised by them, under the terms of the 29th clause, *exclusively.*—No. 11016, D. C. *Colombo, S.* (M.)

Suit for a Divorce—Appeal to the Privy Council.

319.—In suits for Divorce, although it may appear at first sight that parties would be without appeal to the King in Council, where no value appears as the measure of the injury sought to be redressed; yet the Supreme Court will supply that apparent omission by considering every case of this description as above the value of £500, since questions of this nature cannot be measured, as to their importance, by money to any amount.—*Ibid.*

Feb. 18, (R. N.)

Prescription—Wages of Artisans, &c.

320.—The 7th Clause of the Reg. No. 13 of 1822, contemplates, as regards the wages of artisans, labourers and servants, only minor earnings payable daily, weekly, monthly or at such other short period as would justify the *presumption of payment* and the consequent prescription, if not sued for *within one year*; but where a party has agreed in writing to pay a fixed sum on the completion of a certain work, at some indefinite period, it cannot be considered as wages within the meaning of the 7th clause, but may be sued for at any period within 10 years, under the 4th clause, as explained by Reg. No. 5 of 1825.—No. 564, D. C. *Wadimoratchy*, (N.)

March 30, (N. R.)

The Hon'ble Sir William Norris, Knt., was sworn in as *Chief Justice.*

April 9, (N. R. C.)

The Hon'ble William Ogle Carr, Esquire, was sworn in as *Acting Second Puisne Justice.*

Namptissement—Rules & Orders.

321.—The subject of Namptissement is not, it is true, mentioned in the Rules and Orders, but the same may be said of almost innumerable other matters, which it would have been useless as well as impracticable to have embraced within a compilation intended merely for the guidance of the

District Courts in matters of every-day importance.—No. 2532, D. C. *Galle*, (N.)

Priority of Creditors.

322.—Hard as it may seem, it is nevertheless clear that by the Civil Law the activity and diligence of a creditor are not sufficient to entitle him to the fruits of his superior diligence, to the exclusion of other creditors whose claims are prior in point of date, so long as the property or its proceeds are within the custody or control of the Court.—No. 2368, D. C. *Jaffna*, (N.)

April 16, (N. R. C.)

Carrier—Obligations of.

323.—Everything is negligence in a Carrier or a Hoyman (master of a carrying vessel,) that the Law does not excuse. He is answerable for goods whilst in his custody and in *all* events, except they happen to be damaged by the act of God or the King's enemies. And a promise to carry safely is a promise to keep safely.* And though the party be no common carrier, yet if he takes hire, he may be charged upon his special promise.†

Proof of damage during the voyage.

Where it was attempted to be proved that the injury to the goods shipped in a vessel had occurred through unseaworthiness of the vessel; *Held* that this evidence was unnecessary, as the evidence was forcible in proof of the goods having been put on board dry and in sound condition.—No. 6613, D. C. *Colombo, S.* (R.)

Damages—Costs.

324.—Where damages have been allowed, they should carry costs with them.—No. 3696, D. C. *Four Corles*, (C.)

April 20, (N. R. C.)

Title under a Fiscal's Sale.

325.—A Fiscal's Sale is not of necessity binding, so as to give an irresponsible title to the pur-

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* See Voet *ad Pand.* iv. 9.—Van Leeuw *Cens. For.* part. 1. lib. xxx. tit. 3.—Bynkersh, *Q. J. Priv.* c. iv.—V. d. Keessel, *Thes.* 682, 3.—V. Linden, *Jud. Pract.* p. 370, and *per* Rough J.—"The passage in *Molloy* b. ii. c. 2. § 13, stating that by the Marine Law, he that will charge a Master with a fault, as in relation to his duty, must not think that a general charge is sufficient in law, but ought to assign and specify the very fault wherewith he is charged,—certainly must have reference to suits *ex delicto* only. The dictum is inapplicable to cases of contract."—See also *Dale* v. *Hall*, 1 Wils. 281, and *Goff* v. *Clinkard*, 1 Wils. 282.

† Bacon's Abridg. vol. ii, *Carriers* B.—Palm. Rep. 523.—Salk. Rep. 12.

chaser against all claimants.—No. 5663, D. C. *Matura,* (R.)

326.—In an action to recover certain cattle from the defendant, the Supreme Court *held* that the length of possession of the cattle by the defendant, having been accompanied (as appeared by the evidence of one of the witnesses, a Police Vidahn,) by an acknowldgment of the title of the plaintiff, was no bar to the plaintiff's claim, and remanded the case for further evidence. —No. 2543, D. C. *Batticaloa,* (C.) Possession—Acknowledgment of title.

327.—A District Judge may not alter his own decree.—No. 1624, D. C. *Walligame,* (R.) Decree,—cannot be altered.

328.—A case was remanded to the District Court, in order that the defendant's witnesses might be heard and the case re-decided, *if* the defendant should satisfy the District Court that he had really been misled (as alleged by her Proctor,) by one of the clerks of the Court.—No. 7799, D. C. *Colombo, N.* (N.) Party—misled by a clerk of the Court.

329.—It did not clearly appear in what character a person called as a witness in a case had acted, in amending a certain bill at the plaintiff's request, in a former suit: but *held* that if he was then acting as the Proctor for the plaintiff, or as an Interpreter or Agent for such Proctor between him and the plaintiff, his evidence of any communications made to him in that suit by the plaintiff would be inadmissible against the latter in the subsequent case.—No. 2195, D. C. *Batticoloa,* (C.) Proctor—Proctor's Agent. Privileged communication.

April 27, (N. R. C.)

330.—The plaintiff's admission of a part-payment certainly discharges the defendant from proving such payment, but it raises no presumption against the plaintiff's claim for the arrears due. Where the bond is admitted and has been allowed to remain in the plaintiff's possession uncancelled, it is for the defendant to discharge himself therefrom.—No. 1370, D. C. *Caltura,* (C.) Admission of part-payment. Bond—Proof of payment.

May 4.

331.—Where a party had expended money in defraying the funeral expenses of her deceased Funeral Expenses.

illegitimate husband, which she was not bound in law to provide for, she was *held* entitled to recover re-payment thereof from the personal representative of the deceased out of the assets or property left by him.—No. 3109, D. C. *Trincomalie,* (C.)

May 7, (N. R. C.)

Agreement—Acceptance of offers made.

332.—Where there was no satisfactory evidence to shew that certain offers made by the defendant had been accepted, either expressly or impliedly, by the plaintiff; *Held* that there could not be said to have been any *Agreement* between them.—No. 9645, D. C. *Colombo, S.* (N.)

Reversal of a Decree on contradictory evidence and on Possession proved, though not pleaded.

333.—A decree of the District Court of Kandy was reversed in appeal; and *per* CARR J.—"The Supreme Court discredits the evidence adduced by the plaintiff, considering the *variances* in the testimony of his several witnesses, more especially as the length of time which the plaintiff has allowed the defendant to retain possession of the property in dispute, without having any written acknowledgment or evidence in proof of his right and without instituting any action for the recovery of the said property, would have been a bar to their suit under the Reg. No. 8 of 1834, if it had been properly pleaded."—No. 7476, D. C. *Kandy*, (C.)

Decree—Third Parties.

334.—Where a person has not been a party to a suit, and does not claim by inheritance from or otherwise through such party, his claims are not barred or affected by a decree pronounced in that suit.—No. 685, D. C. *Ratnapoora,* (C.)

Arbitration—Want of Assent of the Parties.

Report of the Arbitrator.

335.—Where there appeared to be some doubt as to whether or not the assent of the parties had been freely and irrevocably given to an Arbitration, (which was the subject-matter of the complaint in appeal,) the case was referred back for the reconsideration of the District Judge, who was directed to hear, himself, such evidence as might be offered, and to give his final decree accordingly, making such use, as he might see fit, of the reports made by the Arbitrators and the Umpire.—No. 1539, D. C. *Walligame,* (R.)

May 18, (N. R. C.)

336.—Where the defendant had been a party to a former suit in respect of the same property, wherein it had been held that he could not be dispossessed of such property, the plaintiff in that suit having shewn no right thereto; and it was contended that the plaintiff in the subseqnent suit should have intervened in that case, and, not having done so, was precluded from bringing his action; *Held* that he was not actually excluded from so doing, even though he had *purposed* to intervene in the former suit, but found it so far advanced that he had deemed it more prudent to bring another suit.—No. 743, D. C. *Four Corles*, (R.) Decree—not binding on Third parties, (not being Intervenients.)

337.—A District Judge possesses at his discretion ample power over the Proctors of his Court to enforce their personal obedience and due attention to its orders.—No. 12413, D. C. *Caltura*, (C.) Power of D. J. over Proctors.

338.—A case having been struck off on the ground of neglect on the part of the plaintiff's Proctor, the Supreme Court directed it to be restored to the List on payment by the Proctor of the costs which the defendant may have incurred by the postponement; and *per* CARR, J.,—"The plaintiffs sue as executors, and would morever be barred under the Ordinance by lapse of time from reinstituting any fresh suit to recover their present claim; and these circumstances should rather have induced the Court below to have adopted a lenient course of proceeding in the present case.—*Ibid.* Neglect of Proctor— Prescription of Plaintiff's claim.

339.—A case was returned to the District Court, in order that the defendant might have one more opportunity of summoning his witnesses, on compliance (but not otherwise) with the condition allowed in such cases by rule 24, sec. 1, viz. payment into Court of the plaintiff's costs of the day; which condition did not appear to have been offered to him by the District Court.—No. 3545, D. C. *Four Corles*, (N.) Postponement on payment of Costs.

May 25, (N. R. C.)

340.—If the Reg. No. 13 of 1822 or No. 8 of 1834, has not been pleaded, no benefit can accrue Prescription—ought to be pleaded.

therefrom to a party.—No. 956, D. C. *Walligame*, (R.)

June 1, (N. R. C.)

Service-parveny. Forfeiture by alienation.

341.—As between private parties, the forfeiture incurred by the alienation of service-parveny-land, is a bar to the alienor's action as against a party in possession, whatever may be the rights of the Government.—No. 1652, D. C. *Negombo*, (N.)

Reg. of Frauds. Recovery of money paid.

342.—Though in consequence of an agreement for the purchase of land not having been reduced into writing (pursuant to the Reg. No. 4 of 1817,) the purchaser may not be entitled to recover the *land*, yet he is entitled to recover back the money advanced for the purchase thereof, and also the expenses incurred by him in improving the same. —No. 1571, D. C. *Walligame*, (C.)

Prescriptive title.

Rights of son, during Father's life-time.

343.—Where the defendant's grand-father had been proved to have acquired a prescriptive title to certain lands: *Held* that this might have been available to his immediate heir, the defendant's father, but certainly not to the defendant himself during his father's life-time. [The father had, it appears, long since abandoned the land, and there was no evidence of a transfer of his title to the defendant.]—No. 1957, D. C. *Caltura*, (N.)

Verbal bequest.

344.—A verbal bequest of lands was held to be invalid under the provisions of the Proclamation of the 28th Oct. 1820.—No. 784, D. C. *Ratnapoora*, (C.)

June 4, (N. R.)

Res Judicata.

Restitutio in integrum.

345.—Where a decree pronounced by a District Court had been affirmed by the Supreme Court, and no directions given as to the institution of another suit between the same parties touching the same right, and no appeal successfully interposed; *Held* that the subject-matter thereof had passed *in rem judicatam*; and that no remedy remained save that of *Restitutio in Integrum*, to be sought for through the Sovereign in Council on the ground of the decree and judgment having been obtained *ex falsis in-*

*strumentis.** The Supreme Court on these grounds reversed a subsequent judgment in a suit between the same parties in respect of the same matter.—No. 1174, D. C. *Matelle*, (R.)

June 8, (N. R.)

Proceedings in a case referred back for further evidence.

346.—Where the late High Court of Appeal had referred back a case, with directions to the Provincial Judge "to take such further evidence as might be tendered on either side with respect to the attesting witnesses to the Bond, and to examine them, if there were any; and also to hear proof as to a Bond for Rds. 1,000 having been admitted in account between the parties; and further to hear any witnesses that might be called by the plaintiffs;" and the Judge of the Court below (viz. the District Court, which had since taken the place of the Provincial Court,) had entered upon an examination of the whole case as if it had been an original one; *Held* by the Supreme Court, on appeal, that if his judgment, though unasked, were upon the facts a correct one, it would not be justified in interfering with or changing it, and that the mere circumstance of the District Judge having taken upon himself to determine the case more widely and upon a more extended view of it than he had been actually called upon to do, or in strictness had a right to do, was no ground for interference on the part of the Supreme Court.—No. 10423, D. C. *Colombo, N.* (R.)

Plea of *not indebted.*

347.—Where a defendant had pleaded *not indebted,* and it afterwards appeared, in the course of the general case, that more bonds than one were in existence; *Held* that it could hardly be considered culpable, or betraying trickery in the defendant, that he should say in his Answer that he was not indebted, implying that he had made payment thereon. It was no denial positive of the actual Bond.—*Ibid.*

Appropriation of Payments.

348.—In an action on a Bond, it was proved that a sum of Rds. 600 had been paid specifically by the defendant in reference to the Bond; and *per* Rough J.,—"The plaintiff, had she not meant

* Van Leeuw. *Cens. For.* par. ii. lib. i, c. 31. § 13.

so to receive it, should have made the objection at the time, and in fact not have received it at all; for she had still her remedy by action.—*Ibid.*

Proof of a lost instrument.

349.—" The cases *Reed* v. *Brookman** and *Hendy* v. *Stephenson*† (the latter subsequent to *Keeling* v. *Hall*,‡) ought to make a Court cautious how it conceded too implicit force to the allegation of loss [of an instrument.] It should require all collateral proof possible. Lord Kenyon's *dictum* borrowed from Dr. Leyfield's case§, of not adding calamity to calamity, as in a case of loss by fire, but receiving such evidence as offers itself, is applicable doubtless to the case of *Keeling* v. *Hall*; for in the latter case there were no other bonds subsisting between the parties, save the one sued upon, and there was direct evidence that the party executing it had acknowledged that especial Bond."—*Ibid.*

Res judicata.

350.—The same point, between the same parties, having been once decided, the subject-matter cannot be re-opened. It will be for the District Judge to determine, should another action be attempted, whether or not the question, which will then be in issue, be different and distinct.—No. 800, D. C. *Ratnapoora*, (R.)

Breach of Promise of Marriage.

Damages.

Amicable Settlement.

351.—Where a decree for damages had been passed against the defendant in an action for breach of Promise of Marriage, the Supreme Court, upon the defendant professing his readiness to marry the party, affirmed the decree conditionally, and directed that execution should be stayed for two months in order to give the parties an opportunity of coming to an amicable settlement; in which event judgment was to be entered for the plaintiff for one shilling damages, each party paying his own costs.—No. 2794, D. C. *Batticaloa*, (N.)

Absence of Witnesses.

352.—" The defendant should have been prepared with his witnesses at the time of trial; nor can it be permitted him to dispute in appeal the

* 3 T. Rep. 151.
† 10 East, 60.
‡ Peake's Ev. App. 82.
§ 10 Co. Rep. part. 10, fol. 93, cited 6 M. & W. 728.

identity of the subject-matter of the suit, upon the alleged ground of the witnesses having been bribed to give testimony against him, of which there is no proof; nor should such a fact be stated."—No. 1502, D. C. *Seven Corles*, (R.)

False Evidence—no ground of Appeal.

353.—The exception *non numeratæ pecuniæ* is allowable within two years; and the plaintiff should be called upon to prove the payment or delivery, the defendant being at liberty to adduce counter-evidence.—No. 2815, D. C. *Batticaloa*, (N.)

Want of Consideration.

June 15, (N. R. C.)

354.—On proceedings upon an opposition to Banns of Marriage, by a party who stated that the bridegroom had previously promised to marry his daughter, the Supreme Court directed that the complainant (the bridegroom) should be called upon to admit or deny his alleged promise; and in the event of denial, that the opponent should be at liberty to go into proof of his allegation, and the complainant to adduce counter-evidence;—the publication of the banns in the meanwhile being stayed.—*Bosabadoegey* v. *Illecuttigey*, D. C. *Caltura*, (N.)

Opposition to Banns of Marriage—Proceedings upon.

355.—"Although it be undoubted Law that any interlocutory order of a District Court may be appealed against, and, though generally speaking it is the safer course for the District Judge to permit his interlocutory order to be contested in appeal; yet according to the Letter of Instruction by the present Judge referred to,* he may,

Interlocutory Order—Appeal against.

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* See Letter-Book, 1836, p. 156. The letter referred to was written under the direction of Rough, J., and is to the following effect:—"I am directed to ask, whether or not the fact mentioned in the Petition of Appeal be as stated, namely that an order had been made by you as District Judge, at the request of the plaintiff, requiring the personal attendance of the defendant for the purpose of personal examination,—such order appearing to have been made and entered upon the proceedings on the 19th February? It is correct on your part to say (referring to the letter addressed to you on the 31st October 1834,) that it is in the exercise of your own discretion to allow or to disallow an appeal against an Interlocutory Order. But if an interlocutory order was really made and entered regularly, it should have been by you in writing rescinded,—against which rescindment the dissatisfied party might have sought to appeal. You might then have either proceeded or not upon the merits, including the appeal against the rescindment, and leaving that point to be settled along with the definitive sen-

Interlocutory Order—may be rescinded by District Judge.

where an interlocutory sentence can be set right on the definitive, proceed to pronounce the latter." —No. 1145, D. C. *Amblangodde*, (R.)

Application for postponement.—Striking off a case.

356.—The District Courts are vested with the discretionary power of striking cases off the list on the absence of parties; but it is obvious that such power should be exercised with every indulgent consideration of the particular circumstances of each individual case. Where therefore in a case which had been struck off upon the plaintiff's not being ready to proceed on the day of trial, it appeared that he had attended the Court on several previous days, when the defendant had absented himself, the Supreme Court *held* this circumstance alone to be strongly in favor of the application for a postponement made by the plaintiff; and accordingly directed the case to be restored to the List of pending cases.—No. 771, D. C. *Matura*, (C.)

Decree—not binding on Third Party.

357.—The Supreme Court referred a case back to the Court below, to take the evidence to be adduced by both parties and to decide the case accordingly thereon; and *per* CARR J.,—"It is quite clear that any former decree obtained in another suit in favor of the defendant in this case, can be no bar to the present suit of the plaintiff, unless the plaintiff had been properly made a party before the Court to that suit, or else deduced his present title and claim through the person against whom the decree in such former suit was passed, neither of which appears to be the fact in the present instance. The defendant must therefore in this case, notwithstanding the above decree, enter again fully into his evidence in support of his own title against any proof which may be adduced by the plaintiff on behalf of his claim." —No. 3992, D. C. *Four Corles*, (C.)

S. C. cannot alter its own Decree.

358.—The Supreme Court has no power to *alter* or *amend* its own decree without the consent of both parties; but may give any explanatory

tence. A Judge may alter or recal an interlocutory sentence, though he may not change or alter a definitive one. But as the case is now alleged to stand, you have avoided and passed over without notice your own previous order."

direction which may be necessary in order to carry out a decree properly into effect.—No. 973, D. C. *Matura*, (N.)

" Possession"—Actual Occupation.

359.—Where Possession is alleged generally, without stating special circumstances, as planting, dwelling thereon, &c., the expression need not necessarily be confined to mean the actual *occupation*, but is capable of being understood in its more general sense of the party being the proprietor or owner of the land, especially where the possession of the actual *occupier*, paying ground-share to the plaintiff, would in construction of law be the possession of the latter.—No. 905, D. C. *Four Corles*, (C.)

Possession—Acknowledgment of Title.

360.—Where it appeared that the plaintiff had inherited the land in dispute from her parents, and that it had been mortgaged nearly twenty years before to the defendant, but that there had been an acknowledgmnt of the plaintiff's title till within the last eight years, when the defendant's possession became adverse; *Held* 1, that such possession of the defendant did not give him a prescriptive title, and that the plaintiff would be entitled still to recover it on payment of the alleged debt due on the mortgage, unless the defendant could adduce evidence in support of his title to set aside the claim of the plaintiff; and 2, that it being a rule that the right of the Heir is favored, and that he cannot be disinherited except on clear proof, the plaintiff had a right to know by what means, or under what deed he was to be disinherited; and therefore that the defendant should produce the deed under which he claimed, or should give satisfactory evidence of his title.—*Ibid.*

Presumption in favour of the Heir.

Payment of produce—where produce is to be retained in lieu of Interest.

361.—The payment of produce or ground-share by the defendant (who claimed as mortgagee,) to the plaintiff, was *held* not inconsistent with the usual practice of the mortgagees' retaining the produce for their interest; for it is not improbable, when land is mortgaged to a small amount and below the value thereof, that the mortgagees might be the *goiyas* of, or allowed to cultivate, the whole land, on payment of part of the produce to the

plaintiff, retaining a portion of such ground-share in payment of the interest due on their mortgage. —*Ibid.*

Deeds—thirty years old.

362.—Certain deeds produced in evidence being apparently upwards of thirty years old, were held not to require proof.—No. 2657, D. C. *Batticaloa*, (C.)

June 22, (N. R. C.)

Demurrer.

Action against the Executor of an Administrator.

363.—On demurrer each party must, according to settled principle, stand or fall by his own pleading. When therefore the Libel merely charged the defendant as executor of B., who had in his lifetime been the administrator of A., *Held* that the defendant could not be made liable in the action as executor *de bonis non administratis* of B.*—No. 10753, D. C. *Colombo, N.* (N.)

June, 29, (N. R.)

Evidence of a Secretary.

364.—The simple evidence of the Secretary of a Court, not upon oath, is hardly sufficient to shut a party out of his rights.—No. 2479, D. C. *Caltura*, (N.)

Witness—convicted of Perjury.

365.—The admission of a Witness that he has committed perjury, ought not to be received, and cannot be taken to be evidence of such fact of perjury committed. To prove a party perjured, the record of conviction from the Court in which the conviction took place is the absolutely necessary evidence; and the admission of the witness will not supersede the necessity of producing the record or an examined copy thereof.†—No. 2823, D. C. *Putlam*, (R.)

Reg. of Frauds. Sale of Immoveable property.

366.—In an action against an Administrator for the recovery of a certain garden in the possession of which the plaintiff had been disturbed, it was

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* A. had left a Will, and administration with the will annexed of his estate had been granted to B. The plaintiff in the above case claimed a legacy left to him by the will of A. (The original case among the records of the District Court of Colombo, is interesting on account of other points respecting Prescription of Executors &c., discussed before the Court below.)

† *R.* v. *Castel Careinion*, 8 East, 77.—Matthæus *de Criminibus*, lib. xlviii. tit. 16. p. 277.—Voet. *ad Pand.* xxii. 5. 14.—Van Leeuw. *Cens. For.* part. ii. lib. ii. c. 7. § 7.

proved by the witnesses for the plaintiff that the deceased had agreed to sell the garden to the plaintiff for Rds. 300, that the plaintiff had thereupon paid Rds. 51 on account of the deceased to a person with whom the garden was then in mortgage for that amount; that in pursuance of such agreement the deceased had put the plaintiff in possession of the garden, and had sanctioned a survey thereof; that he had attended at such survey and pointed out the limits to the Surveyor; and that on his authority, the Surveyor had entered in the survey (which was produced in evidence) that it was a piece of land "purchased" by the plaintiff; that a deed of Transfer (also produced in evidence) had been prepared on stamp by a Notary at the request of the plaintiff, but which transfer the deceased had never attended to sign; that after his death, his widow (the defendant) had applied for administration, and had acknowledged to the Commissioners who attended to inventorise and appraise the property of the estate, that the garden had been sold to the plaintiff by the deceased; and finally that in the Inventory and Account filed in Court and sworn to by her, she had made no mention of the garden in question.

Upon this evidence the Court below had decided that the agreement to sell had been fully proved, and that the defendant had no right to withdraw herself from the fulfilment of the contract on the plea that the stamped deed had not been fully executed.

On an appeal against this decision, founded on the Reg. No. 4 of 1817, the 2nd clause of the Reg. No. 20 of 1824, and the 9 & 15th clauses of the Reg. No. 4 of 1827, Rough J., after alluding to a previous decision of the Supreme Court (*supra* § 101,) in which he fully acquiesced, *held* that there was on the whole sufficient evidence to warrant the decision of the Court below, which was accordingly affirmed. "This transaction does not indeed, in the way of contract, begin with a letter written, addressed by the plaintiff to the defendant offering a sale; but there is a reduction into writing (the Surveyor being taken to be the

Contract in writing.

Stamp.

agent of the latter and signing by his order,) sufficient to create a binding agreement between the parties, particularly as possession followed upon such agreement. This case cannot therefore be legally affected by the Reg. No. 4 of 1817, nor is it touched by the 2nd clause of the Reg. No. 20 of 1824. The greatest obstacle presenting itself is that arising out of the consideration of the 9th and 15th cl. of the Reg. No. 4 of 1827. There are however acts of the plaintiff in this case which sufficiently answer these difficulties." —No. 8249, D. C. *Colombo, N.* (R.)

July 6, (N. R.)

Dismissal, set aside, as a nullity.

367.—An order of dismissal must be considered as a decree, and a District Court therefore has no power to set it aside by a subsequent order, which the Supreme Court accordingly treated as a nullity. But where it appeared that the previous order of dismissal was equally a nullity, as not having been made conformably to the provisions of cl. 30 of the Charter, the Supreme Court set it aside, and directed the case to be restored to the List.—No. 2992, D. C. *Ruanwelle*, (N.)

Administration to the Widow.

368.—It is but reasonable that the Widow's natural right to administration of the husband's estate should not be shut out in favour of a stranger without some definite and valid ground of objection, assigned upon oath; especially where she is prepared to give the required security. The allegation of a Head-moorman "that he does not consider her a fit and proper person, &c.," (without any cause assigned,) was *held* to be too vague and general, and one which, if admitted, might open a door to much imposition and fraud. —No. 10547, D. C. *Colombo, S.* (N.)

July 13, (N. R.)

Intervention.

369.—It is the result of the evidence that must shew whether or not a party desiring to intervene has any right to the property in dispute. —No. 1108, D. C. *Caltura*, (R.)

July 20, (N. R.)

Mahommedans.

370.—In a suit brought by a Mahommedan woman, the defendant had pleaded that the husband

of the plaintiff ought, in law, to have been joined as co-plaintiff; but the Mahommedan Assessors in the Court below having stated, as a matter of Law, that the wife might sue alone, and it appearing further that the plaintiff had, previous to the filing of the plea, been examined under rule 31 of the *Rules and Orders*, touching a sequestration obtained by her in the case, the Supreme Court thought that the plea of the defendant was too late and " under all the circumstances of the case (the information tendered to the Supreme Court tending also to shew that the wife is accustomed and has a right by Mahommedan Law to sue alone,) directed the Court below to over-rule the plea, and to proceed to the investigation and determination of the case; the plaintiff being of course liable to costs should she fail in the proof of the allegations in her Libel."—No. 8237, D. C. *Kandy*, (R.)

Right of Wife to sue.

August 3, (N. R. C.)

371.—If a plaintiff wishes to sue for increased damages, other than those mentioned in his Libel, he ought to amend his Libel accordingly, and cannot claim them in the Replication or a subsequent examination.—No. 3697, D. C. *Four Corles*, (C.)

Subsequent claim for increased damages.

372.—Though the plaintiff should succeed in recovering some damages, yet if he materially fails to prove that his loss amounts to the extent claimed by him, he should be declared entitled to recover costs from the defendant only according to the class in which damages may be decreed to him; all the surplus costs occasioned by the case having been brought in a higher class being borne by himself.—*Ibid.*

Judgment for less than the amount claimed.

Costs.

373.—Where the defendant, in his Answer, admitted that a sum of Rds. 50 had been advanced to him by the plaintiff, and that the plaintiff had refused to receive it when tendered, owing to his alleged claim for a transfer of the land to him; the plaintiff having failed to establish such claim in the suit brought by him; *Held* that he was still entitled to recover back, in the same suit, under the prayer in his Libel " for further re-

Prayer for further relief.

lief," the sum advanced by him to the defendant, delivering back to the defendant the title-deed which had been deposited with him; and each party paying his own costs, (the defendant having omitted to pay the sum into Court, or to tender it with his Answer.)—No. 3100, D. C. *Chilaw*, (C.)

Admission without Tender.

Costs.

Aug. 17.

Transfer of cases, on establishment of new Courts.

374.—On the motion of the plaintiff, it was ordered that a case which had been instituted and decided before the late Supreme Court, should be transferred to the District Court of Jaffna, to enable the plaintiff to sue execution against the defendant in satisfaction of the judgment.—No. 5509, (N.)

Transfer of a case instituted in a wrong Court.

375.—Where a case, which ought to have been instituted in the District Court of Negombo, had by mistake been instituted in the District Court of Colombo, South, the Supreme Court on the motion of the plaintiff ordered it to be transferred from the latter Court to the former.—No. 10585, D. C. *Colombo, S.* (N.)

Aug. 18.

Petition *in forma pauperis.* Fresh Reference.

376.—Where an application to sue *in forma pauperis* has been rejected on the report given by the proctor to whom it was referred, the District Judge is at liberty, in the exercise of his discretion, to refer the enquiry if he sees fit *de novo* to another Proctor.—*Pet. of S. E. H. Maartensz,* (N.)

Aug. 24, (N. R. C.)

Trespass. Joint and several liability of Defendants.

377.—In an action for the value of certain paddy forcibly taken possession of by the defendants, it appearing that the object of both the defendants had been to carry off the paddy, in which they succeeded; *Held* that the different means taken by each to accomplish this one object could not affect their joint and several responsibility to the plaintiff for the loss and injury they had both occasioned him, (though but for the assistance of one of them, who was a Headman, their object might probably have been defeated;) and they were accordingly *both* condemned to pay the amount of damages sustained by the plaintiff.—No. 1784, D. C. *Caltura,* (N.)

378.—In an action for Defamation, where merely *nominal* damages had been given, and the defendants further decreed to pay costs, the Supreme Court was, under all the circumstances, strongly inclined to consider the costs as given in the original class; but the defendant having expressly stated in his petition of Appeal that costs had been given in the *original* class, it was *held* that all difficulty in this respect had been removed, and that the defendant had thereby precluded himself from taking the objection.—No. 2149, D. C. *Caltura*, (C.)

Costs—Nominal Damages.

379.—The District Court should not encourage cases of Slander or Defamation, more especially their being instituted in a high class; but where any such action appears to have been properly instituted, and the words are alleged to have been spoken with an *intention* of injuring the plaintiff's reputation, the Supreme Court would be cautious in dismissing the suit on account of a *variance* between the expressions set out in the Libel and those deposed to by the witnesses, if the malicious or *defamatory* words alleged in the Libel are proved to have been used by the defendant.—*Ibid.*

Action for Defamation.

Variance in respect of the expressions used.

380.—Where a Proctor has been wanting in due skill or care in the management of a suit, he is liable to his client for any damages arising from it, provided he can clearly prove such neglect.—No. 3001, D. C. *Ruanwelle*, (C.)

Proctor—liable for Neglect &c.

381.—Where two defendants have put in separate Answers, one cannot be prejudiced by statements made by the other.—No. 9548, D. C. *Colombo, S.* (C.)

Separate Answers of Defendants.

382.—One of the attesting witnesses is sufficient to prove a deed.—*Ibid.*

Proof of Deed.

383.—Where the plaintiff had by his Libel claimed a half of certain lands, which was more than he was legally entitled to, and there had also been some delay in the institution of the suit, and it appeared that the defendant had not only been some years in quiet possession of the property claimed, but was considered by the District Court to have made out an equitable title to the same,

Division of Costs.

the Supreme Court in decreeing one-fourth of the land to the plaintiff, refused to allow him his costs against the defendant, but decreed that each party should bear his own costs.—No. 784, D. C. *Ratnapoora*, (C.)

Division of Costs.

Purchase, in ignorance of a Sequestration.

384.—The Supreme Court affirmed a decree dismissing the plaintiff's suit against the Government, but directed that each party should bear his own costs; there being no legal proof of the plaintiff having taken the assignment under which he claimed, with a knowledge of a sequestration which was then pending on the property assigned. The witnesses only spoke to the plaintiff's presumed or probable knowledge thereof from the fact of the sequestration occurring and being publicly known in his village at the time it was issued, and from his being related to the party who had made the assignment, while the possession of both the land and the title-deeds being allowed to be retained by the former possessor after the sequestration, was both irregular and highly calculated to mislead really innocent parties as to the existing title to the property in dispute.—No. 2697, D. C. *Batticaloa*, (C.)

Administration to Widow Proof of Marriage &c.

385.—In a case of opposition to an application for Administration, the Supreme Court referred the case back to the District Court to call for proof from the opponent (the alleged widow) of her marriage with the deceased and also of there being a son by that marriage borne to the deceased, and still living.—No. 3835, D. C. *Trincomalie*, (C.)

September 7, (N. R. C.)

Administration—Parties dying abroad.

386.—The Supreme Court, on full consideration of the 24, 26, 27, 29th and other clauses of the Charter, was of opinion that the District Courts had power to grant administration to the estates of persons leaving property in Ceylon, although such persons may have died abroad.—No. 13732, D. C. *Colombo*, *S.* (N.)

Date of Deed—Delivery.

387.—The *date* of a deed is of itself quite immaterial to its validity. The important part is the *delivery*, and the object of the Notarial attestation is to vouch such delivery.—No. 1863, D. C. *Matura*, (N.)

388.—NORRIS C. J., in the course of delivering a judgment in review, on an appeal to the King in Privy Council, said—" Mr. *Justice* CARR has, with proper professional delicacy, declined to give any opinion in the case, having been engaged as Advocate for one of the parties."—No. 646, D. C. *Kandy*, (N.)

A Judge previously engaged as Advocate in the cause.

389.—On an appeal to the King in Privy Council, it was held in review that an Appellant (both parties being Buddhist Priests, and the suit relating to the right to a certain Temple and the lands appertaining to it,) had an unquestionable right (if he could get over his own religious scruples,) to insist on a fair valuation of the temple and its appendages as mere material property, without reference to its sacred character; although, if the lands alone were found to be of sufficient appealable value, it would certainly be desirable to avoid shocking the prejudices of the people by a needless valuation of the Temple.—*Ibid.* (N.)

Appraisement of a Temple.

390.—On argument in appeal, an objection was taken to the title of the plaintiff, which it was affirmed was invalid inasmuch as it was by a bequest made verbally after the Proclamation of the 28. October 1820, by which the Statute of Frauds and Perjuries was briefly introduced and intended to operate in the Kandian Provinces. ROUGH J. said that having referred to the whole proceedings in the case, to the entire omission of any and all reference to such Proclamation in the District Court, the suit having been there commenced, conducted, and concluded on grounds wholly independant of any State-enactment, he certainly considered that the objection had been taken too late; and on Review, upon an Appeal to the King in Privy Council, he was of that opinion still.—*Ibid.* (R.)

Stat. of Frauds.

Objection not taken in the Court below.

Sept. 14.

391.—A deed was held to be *void* as not having been properly stamped under the provisions of the Reg. No. 2 of 1817.—No. 2734, D. C. *Batticaloa*, (C.)

Stamp—Want of.

Suspicions against Plaintiff's title.

392.—"The reluctance of the plaintiff to produce his deed, and the appearance of erasure and alteration thereon, together with the plaintiff having made all the defendants parties to the case, with the obvious view of depriving the first and second of their testimony, throws the very greatest suspicion of the plaintiff's really possessing any equitable claim to the land in dispute and on the deed being genuine."—*Ibid.*

Right of a divorced Wife or destitute Widow to support.

393.—If a woman has become divorced from her husband, or is a widow destitute of the means of support, she would have a right to return to the house of her parents, and there to have lodging, support, and clothing from her parents' estate; but when she fails to produce evidence to this effect, she will have no such claim.—No. 7901, D. C. *Kandy*, (C.)

Admissions, as Witness in a former action.

394.—Where the owner of property, when examined as a witness in an action between other parties, has affirmed or disaffirmed a sale by himself, the verdict would not be evidence either for him or against him in any future action.*—No. 7390, D. C. *Kandy*, (C.)

Omission of the names of Assessors.

395.—The Supreme Court affirmed an order of the Court below, although the names of the Assessors had not been inserted in the proceeding on such order.—*Ibid.*

Trial, pending an Interlocutory Appeal.

396.—Where pending an Appeal on an interlocutory order, the case was to come on for trial on the next day in the Court below, the Supreme Court, on the motion of the plaintiff and respondent, ordered it to be returned back to the District Court for the purpose of being heard on the other points, reserving the point in appeal for argument before the Supreme Court.—No. 4919, D. C. *Colombo, N.* (C.)

Sept. 21.

Administration refused to the Widow.

397.—In a contested application for Administration, it was *held* that under ordinary circumstances where no objection appeared, the election of the Judge would, according to modern prac-

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* *Nix* v. *Cutting*, 4 Taunt. 18.

tice, be in favor of the widow; but considering that it was entirely at the discretion of the Judge to grant administration to the widow or to the next of kin, as he thought right, and as there were very strong circumstances of suspicion* proved against the alleged widow in regard to her having been concerned in procuring a false registry of marriage to be entered in the Thombo, the Supreme Court felt bound to order Letters of Administration to be granted to the next of kin without prejudice however to any suit that such alleged widow might thereafter institute to establish her marriage and her claims as widow to a portion of the intestate's property.

* These suspicions were based on certain criminal proceedings had before the King's Advocate and on his observations thereon; and *per* CARR J.—"Though this Court will not make any decision upon the evidence thus taken, which might operate as a bar to a suit hereafter to establish the alleged marriage and the rights accruing thereupon, yet it may very properly refer to the above criminal case in determining whether Letters of Administration ought to be granted to the alleged widow in preference to the next of kin who have an equal right thereto."—No. 54, D. C. *Caltura*, (C.)

398.—An objection having been taken in the Court below against the admissibility of an instrument, on the ground that it was not properly stamped, (Reg. No. 7 of 1823, cl. 3, 4, 5, 13 and 14,) and had not been passed before a Notary and two witnesses, (Reg. No. 20 of 1824;) the question came in appeal before the Supreme Court. The instrument in question purported to be a "Marriage-contract," and after reciting that the plaintiff had solicited in marriage the daughter of the defendant, to which the defendant had consented, contained an agreement on the part of the defendant "to give in dowry to the plaintiff, two months after such marriage, besides the paternal share of the daughter, certain jewels and one-third part of a certain house and garden; and that as the father of the plaintiff had agreed to pay Rds. 400, being the value of the remaining two-thirds

Stamp—Frauds and Perjuries.

Marriage-Contract.

of the said house, she the defendant had consented that the plaintiff should take possession of the whole house." The Supreme Court considered that this agreement was admissible in evidence, as being properly stamped (with a stamp of Rds. 2,) according to cl. 13 of the Reg. No. 7 of 1823, and that the other clauses referred to of the above Reg. were not applicable to an Agreement of this description; nor could it fall properly within the provisions of cl. 2 of Reg. No. 20 of 1824; and *per* CARR J.—"It is not a *deed*, for it is not under *seal*: neither has the writing any of the usual formalities of a conveyance or formal instrument; but it must be considered as a Memorandum of Agreement or Contract for the proposed marriage-*settlement*, to be carried into effect, binding on the parties upon the solemnization of the marriage." —No. 4919, D. C. *Colombo, N.* (C.)

Sept. 28.

Res Judicata.

399.—A defendant having pleaded in bar to a suit the decree in a former case, which appeared from the plaintiff's Libel and Replication to have been instituted for the recovery of the same land, such plea was held a sufficient bar to the subsequent claim of the plaintilff.—No. 1809, D. C. *Caltura*, (C.)

Pauper—Proctor's Report—Objections to.

400.—Where an application to defend *in forma pauperis* had been rejected by the District Court upon the report of a Proctor to whom it had been referred, that there existed no good grounds of defence, the Supreme Court refused to order the Petition to be referred to another Proctor upon a mere vague and general assertion in the Petition of Appeal that the Proctor to whom it had originally been referred, had reported against it without making proper enquiries; and *held* that it was clearly the duty of the party to have stated fully his objections to the Report before the District Court, which upon satisfactory proof of any neglect by such Proctor in the performance of his duty, would have taken the proper steps to correct it; and as no such previous objection or proof appeared to have been offered to the District Court, the Supreme Court refused

to make any reference back on the Petition, but dismissed the appeal taken by the Petitioner.—No. 1127, D. C. *Wadimoratchy*, (C.)

Several Counts—Prescription, how pleaded.

401.—A plaintiff is entitled in pleading to lay his claim or right of action in different ways or counts, so that on the failure of the proof in support of one, he has a right to proceed into evidence to maintain his other title. It had been previously held by the Supreme Court that a defendant is entitled under the wording of cl. 2 of the Ordinance No. 2 of 1834, to give evidence of his prescriptive title by undisturbed possession for 10 years, where such possession had been set out in the Answer or been put in issue by the pleadings, though the said clause was not specially pleaded in bar under rule 6, sec. i. of the *Rules and Orders*. A plaintiff therefore who had not in the pleadings confined her claim or title expressly to or under a deed, but on the contrary had alleged in the Replication that she had possessed the lands for upwards of 10 years, and that the possession of the defendant was with her permission, and that he had never claimed a proprietary right or title adverse to and independant of her title, was *held* entitled to go into evidence in support of such prescriptive title.—No. 7519, D. C. *Kandy*, (C.)

402.—By the Civil Law a surety, on the payment of the principal debt, has the privilege to demand from the creditor Cession of Action not only against the principal debtor, but also against all other persons that are liable;* and there is no law more generally and clearly defined than the equity or right of a surety thus to enforce every security and all means of payment which the creditor had,† and to have any fund in Court, which is charged with the principal debt, applied for his exoneration or indemnification.‡—No. 6499, D. C. *Colombo, N.* (C.)

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* V. d. Linden, *Inst.* 212.—Van Leeuw. *Comm.* 331.

† *Craythorne* v. *Swinburne*, 14 Ves. 162.

‡ *Parsons* v. *Briddock*, 2 Ves. 608.—*Wright* v. *Morley*, 11 Ves. 12.—*Harrison* v. *Glossop*, *Coop.* 61.

October 12.

The Hon'ble WILLIAM ROUGH, Serjeant at Law, was sworn in as *Chief Justice.*

The Hon'ble JOHN FREDRICK STODDART, Esquire, was sworn in as *Second Puisne Justice* and as *Acting Senior Puisne Justice.*

The Hon'ble WILLIAM OGLE CARR, Esquire, was sworn in as *Acting Second Puisne Justice.*

Ex parte Hearing, on absence of defendant.

403.—If a District Court has, in consequence of the defendant's absence on the day of trial, proceeded to hear the case *ex parte*, the Supreme Court will not alter its decision; but where the the District Court is unable to proceed into and decide the case on the day of trial, and is accordingly obliged to postpone it, the defendant is entitled to the benefit of that necessary postponement, and to adduce evidence on the day to which it has been so postponed.—No. 3545, D. C. *Four Corles*, (C.)

Necessary Postponement.

Oct. 26, (R. St. C.)

Objection to Witness.

404.—Where it appeared that no objection had been made in the Court below to the witnesses for the plaintiff on the ground of their being partners with him, and that no evidence had been offered before the District Judge of such fact, the Supreme Court, on appeal, refused to entertain the objection, and affirmed the decree appealed against.—No. 1114, D. C. *Amblangodde*, (R.)

Decree. Powers of District Courts.

405.—A District Court cannot make good or confirm a decree of the Supreme Court. The lower Court cannot affirm or interfere with the adjudication of the higher; it cannot even change the decree of a co-equal Court unappealed from. —No. 1584, D. C. *Seven Corles*, (R.)

Landlord and Tenant.

Ejectment.

406.—The *Nille*-proprietor may assert his right to cultivate the land on payment of the usual fees and performance of the accustomed services; and the owner has no right to eject any such tenant but on clear proof of his not paying such fees or not performing the usual services. And a Court of Equity will generally relieve against a forfeiture for non-performance of a condition or cove-

nant of a Lessee, where compensation can be made.*

Rights of incoming Tenant. Custom.

As to the custom of a succeeding or incoming tenant being entitled to the crop on the land when he takes possession, and the argument therefrom that a party who had been ejected from the land previous to the expiration of his term, could have sustained no hardship thereby as he must have himself in like manner enjoyed the produce of the crop of the preceding tenant; *Held* that such custom obviously applies only to those cases where the last tenant has occupied the land for the full period of his term, viz. one year, according to the accustomed tenure.—No. 794, D. C. *Ratnapoora*, (C.)

Verbal Bequest.

407.—A verbal bequest is void as to lands, and also as to goods, unless accompanied by a delivery of such goods according to the Proclamation of the 28th Oct. 1820.—No. 971, D. C. *Seven Corles*, (C.)

Kandian Law. Succession of Nephews, &c.

408.—By the Kandian Law, Nephews and Nieces of the whole blood succeed before Nephews and Nieces, as well as Brothers even, of the half blood.†—*Ibid.*

Oct. 29, (R. St. C.)

Pleading—Proof of Payment.

409.—A defendant who was sued for his share of the rent of a garden held by him in partnership with the plaintiff, having altogether denied both the renting and the plaintiff's request to pay the amount in question, (which were proved,) was *held* not entitled to enter into evidence to prove payment of the amount claimed by the plaintiff.—No. 3331, D. C. *Trincomalie*, (C.)

Pawn—Action to recover.

Compliance with Police Ordinance.

410.—In an action for the recovery of certain silver articles pawned by the plaintiff with the defendant, the Court, on examination of the plaintiff, finding that the plaintiff had failed to secure himself either by a written instrument or by getting the Police to witness the transaction, (as required by cl. 21 of the Ord. No. 3 of 1834), dis-

* 12. Ves. 475.

† Sawyer's Digest, p. 27.

missed the plaintiff's action. The plaintiff having appealed against this judgment on the ground 1, that the articles had been pledged openly and in the presence of several people, and 2, that the defendant had subsequently promised to return the articles, the judgment was affirmed; but *Held* that had it appeared from the pleadings that proof would be given as to the fact in the petition of appeal, of an acknowledgment on the part of the defendant of articles received, there might have been ground for referring the case back; as such an acknowledgment would probably be held to take the case out of the Ordinance referred to.—No. 12169, D. C. *Colombo, N.* (R.)

Several claims in the same suit.

411.—Where the plaintiff by his Libel claimed certain lands and also certain expenses incurred by him for payment of debts &c., the Supreme Court, on the evidence adduced in the case, dismissed the plaintiff's claim to the land in dispute, but remanded the case for further evidence as to the other claims; and *per* CARR J.,—"The plaintiff, under the allegation in his Libel of expenses incurred, and the concluding prayer therein for other or *further relief*, was entitled in this suit to recover compensation for any such loss or expenses which he proved; and as he sues as a pauper, it is for the advantage also of the defendant that another suit should not be now instituted for the above purpose. The case is accordingly referred back to the District Court to take further evidence as to and decide upon such claims of the plaintiff for compensation as aforesaid, and it is ordered that the defendant do pay *future* costs only in the class of the damages, if any, decreed."—No. 3609, D. C. *Four Corles,* (C.)

Prayer for "further relief."

Costs.

Action against a Married Woman.

412.—Where in the description of the defendant in the commencement of the instrument sued upon, as well as in the Libel of the plaintiff, the defendant was stated to be the wife of B; *Held* that the plaintiff was thereby precluded from alleging in appeal that the defendant had been *divorced;* and the Bond being executed by her as a married woman without her husband's consent, was held to be void.—No. 3676, D.C. *Trincomalie,* (C.)

Divorce.

413.—In an action wherein the plaintiff claimed under a Fiscal's Sale and Certificate, it was *held* that the Fiscal's Certificate could possibly form no bar to the claims of other parties, merely because they had not contested it previously to the suit; and that where the plaintiff had a previous interest in and knowledge of the land in dispute, and consequently of the real claims of all the parties interested therein, or had a title thereto, he could have no possible reason to allege any peculiar hardship in his case from ignorance of other claims existing.—No. 266, D. C. *Tangalle*, (C.)

November 2, (R. St. C.)

Priority of Mortgage over a Judgment,

414.—A Mortgage being of prior date to a judgment, the holder of the mortgage was held to be entitled to a priority of payment, and the property first liable to discharge such mortgage, on the money due thereon being proved to have been really advanced and the mortgage-bond shewn to have been duly executed.—No. 2437, D. C. *Galle*, (C.)

Nov. 9, (St. C.)

Appeal against a Decree founded on evidence.

415.—The Supreme Court considered that it was always better to confirm the decree of a Court which has had the opportunity of examining the witnesses and judging from their demeanour who were most deserving of credit.—No. 1761, D. C. *Seven Corles*, (C.)

Note on a Shroff—not conclusive proof of payment.

416.—The circumstance of a party having taken a note or chit on a shroff for a sum of money, cannot by itself be considered as payment; and further proof of whether the full or any and what amount was paid thereunder is required.—No. 593, D. C. *Manaar*, (C.)

Personal Bond—not passed before a Notary.

417.—A Bond not being executed before a Notary is no objection to its validity as a personal security from the debtor, though such a Bond cannot pass any interest in or operate as an incumbrance on land.—*Ibid.*

Nov. 12, (R. St. C.)

Judgment upon Evidence—

418.—Where the Court below had expressed its opinion that the plaintiff's witnesses were con-

upheld by S. C.

tradictory and little entitled to credit, and had thereupon dismissed the claim as unproved, the Supreme Court on appeal refused to reverse the decree.—No. 2936, D. C. *Chilaw*, (R.)

Sale of more than Vendor is entitled to.

419.—Where a party had by deed conveyed to the plaintiff certain lands which it appeared did not belong *solely* to him, but to the estate of the defendant's testator of whom he was an heir to the extent of one-tenth ; *Held* that the District Court should not, in a suit for such lands between the plaintiff and the defendant, have decreed the deed to be *cancelled* (as in cases of deeds appearing clearly void from forgery or fraud ;) for even presuming that the vendor could not thereby convey any interest whatever in the lands in dispute, the deed would still be important evidence for the plaintiff in an action to recover back the purchase money. But further, it was *held* that the deed, if duly proved, might be considered as effective to entitle the plaintiff thereunder to recover any interest not exceeding one tenth of the land which the vendor might thereafter be entitled to acquire possession of, (he being admitted to be an heir to that extent, and having therefore before the executor's assent an inchoate right thereto after the testator's death, which was transmissible to his representatives and assignable in equity, such assignment being subject, of course, to the defendant's right thereto as administrator and the debts of the deceased.) The case was therefore referred back as to this point, in order that the plaintiff might make the vendor a defendant to the suit, and that upon his admission of the deed or upon due proof thereof, the District Court might reconsider and decide such latter part of the case accordingly.—No. 2689, D. C. *Galle*, (C.)

Rights of Heir—pending Administration.

Res judicata. Dismissal after evidence heard.

420.—Where it appeared that in a former case the claim of the plaintiff had been dismissed, he having gone into evidence, but not having proved his claim, as laid, and no appeal having been sought or had ; *Held* that a subsequent suit between the same parties in respect of the same subject-matter, had been properly dismissed ; and *per* Rough C. J.,—" The Court does not deem it ne-

cessary to say that in no case whatever, nor under any circumstances would a case though dismissed and the costs of the suit paid, be again suffered to be brought forward to be supported as a new suit by new proof; but there is nothing in the present case to justify such a departure from the general rule."—No. 3263, D. C. *Batticaloa*, (R.)

421.—Nothing can justify the rejection of a witness as incompetent on the ground of perjury save the actual conviction produced and filed.—No. 1111, D. C. *Tenmoratchy*, (R.) Rejection of Witness on the ground of Perjury.

422.—There is a difference between the English and the Dutch Civil Laws in regard to Preference of Judgments. By the latter law, when goods are exposed for sale under execution on judgment obtained by a creditor, other creditors may come in and claim them, in which case preference and a judicial adjudication of the money is observed, and the same is adjudged to him who has the *best* and *oldest* right, or among those having the same or equal rights, it is divided equally, to each according to his share; and he who *first* obtained judgment and took out *execution* upon it, does not acquire more right in consequence thereof than another, so long as the proceeds of the execution be not legally given to him and a proper account made thereof.* But neither the English nor Dutch Law authorities on the point can be strictly applicable to a case arising within the old Kandian territory; but should be decided according to general principles of Justice and Equity. A prior security by *general* mortgage and Notarial bond was therefore held to have a prior lien on the debtor's property and preference of payment to a subsequent Notarial bond.—No. 8142, D. C. *Kandy*, (C.) Preference among Creditors. Judgment—Execution. General Mortgage—Priority of, in Kandian Territory.

Nov. 26, (R. St. C.)

423.—Where a party died in the Kandian district leaving a child, who was stated to be a minor, the Supreme Court directed administration to be granted to him, if he were of proper age, on which point the District Court was directed to re- Administration, in the Kandian District to the Guardian of a Minor child.

* Van Leeuw. *Comm.* 656.—V. d. Linden, *Inst.* 492.

quire proof; and *per* CARR J.—" If the applicant be a Minor, the Court should, under rule 18 of *sec.* iv, appoint the party nominated by him, or some proper person selected at its discretion, to be a guardian to the applicant and grant a *limited* administration *durante minore ætate* to such guardian. The applicant would be entitled to obtain full administration of the said estate on attaining his proper age of manhood and discretion, which according to Kandian Law would be at sixteen years of age, when he would be capable of marriage and competent to execute deeds, and answerable at law for debts and contracts entered into by him.*—No. 1712 D. C. *Matelle,* (C.)

Majority according to Kandian Law.

Vexatious action—by Pauper. Explanation from the Proctor reporting on the Petition.

424.—Where an action brought by a party *in forma pauperis* appeared to have been a vexatious and dishonest suit, the Supreme Court directed the District Judge to call upon the Proctor who had certified that the plaintiff had a good cause of action, for a full explanation upon what grounds he had done so. Every permission to sue or defend as a pauper, unless the applicant shews himself strictly entitled to it, and has a good cause of action, is an injustice to the opposite party who has to contend at a great disadvantage; and the Court ought to be fully satisfied in a case of the above description that the Proctor had made proper enquiry into the plaintiff's case and not grossly neglected his duties thereon. In the latter case he would be made to pay the opposite party's costs.—No. 1737, D. C. *Tenmoratchy,* (C.)

Nov. 30, (R. St. C.)

Set-off—of a debt due by A., against a claim of B., who admitted that A. was partly interested in the claim.

425.—In an action for the value of certain paddy sold to the defendant by the plaintiff, the defendant claimed in reconvention a sum of Rds. 500 advanced to the plaintiff; but the weight of evidence at the trial being in favour of that sum having been advanced not to the plaintiff, but to his father, and the plaintiff's liability to pay the same not being proved either by special promise or agreement, or by the amount having been advanced to the plaintiff also, on a partnership-transac-

* Sawyer's *Digest,* 72.

tion or account with his father between them and the defendant, the claim in reconvention was set aside. As it appeared, however, on the plaintiff's own admission at his examination, that one third of the paddy sold to the defendant belonged to the plaintiff's father, the defendant was declared entitled to retain a third of the value or price for which his paddy had been sold, in part satisfaction of his above debt pleaded in reconvention against the plaintiff's demand. Judgment was therefore entered for the plaintiff for two-thirds of the paddy claimed; and the costs were divided, on the ground that the plaintiff had claimed more than he was entitled to, and dishonestly concealed his father's right to a third of the paddy until his examination at the trial.—No. 659, D. C. *Caltura*, (C.)

Costs divided—Dishonest concealment.

426.—As a general principle, compensation for past produce or Mesne Profits, should not be granted in a case of merely disputed right, which in this Island is so lamentably frequent, but only in those cases in which the land has been obtained by force or been held over without any colour of right. And where the plaintiff having brought a suit for the recovery of the land and succeeding therein, had since sued the defendant for the mesne profits, the Supreme Court saw no reason why the plaintiff should not have made his claim for mesne profits in the former suit, when the Court might in considering the whole evidence therein have properly decided whether the plaintiff was fully entitled to any compensation for past profits; and *per* CARR, J.,—"The present suit tends to harass the defendant with the costs of unnecessary further litigation; and neither the allegations in the Libel nor the evidence are sufficient to support the plaintiff's demand, especially considering the long possession of the defendant. —No. 4234, D. C. *Four Corles*, (C.)

Mesne Profits, when decreed.

Double Action for Land, & for Mesne Profits.

December 7.

427.—In an action to recover from the defendant a sum of money paid on his behalf by the plaintiff in respect of a debt due by the plaintiff and defendant as co-obligors, and which sum the

Priority of Creditors.

defendant had admitted to be due to the plaintiff as claimed in the Libel, certain other parties intervened and claimed preference over the plaintiff in respect of a certain debt due to them by the defendant. The Supreme Court entered judgment for the plaintiff as against the defendant for the amount claimed; and as to the plaintiff's right of preference, considered the three following points viz. :—

1. Whether admitting the debt due by the plaintiff and defendant to have been discharged by the plaintiff alone out of her own private property, it was not necessary by the existing Laws of the Colony for the plaintiff to have obtained Cession of Action from the creditor at the time of such payment, or having neglected then to obtain it, she was still entitled to that benefit?

2. Whether the plaintiff having failed to procure such Cession previously to instituting her action, she could be allowed to do so at that stage of the case? and

3. Whether the plaintiff had sufficiently proved as against the Intervenients, that the debt due by herself and the defendant had been paid by her or on her sole account only, out of her private property?

Cession of Action, when necessary.

And as to the *first* point, it appeared that in practice the authority to sue without cession of action had never been disputed, all that was ever required being the receipt of the creditor to prove the payment. It is indeed necessary for a co-debtor *in solido*, on paying the whole debt to the creditor to obtain from him cession of action in order to enable him to proceed against his co-obligor or co-surety *in the same manner* as the *original creditor* could, such cession not taking place *pleno jure*; but where a co-obligor or co-surety has neglected to take this cession of action, he has nevertheless at law a personal action, or the right to proceed in his own name against his co-obligors or co-sureties to recover their portion of the whole debt which he has paid on their respective accounts. The authorities being however very conflicting as to the right of the co-debtor or co-surety, who neglects to obtain cession at the

time of payment, to claim it subsequently or *ex intervallo* (though at the time of payment the creditor is bound to grant such cession, or payment might be refused,) the Supreme Court laid down the following distinctions :—

Co-obligor paying on behalf of his Co-obligors.

a. That Cession of Action must be obtained or expressly agreed for at the time of payment, where the co-obligor or co-surety pays off his whole debt on behalf of not only himself but his co-obligors or co-sureties ; in which case the equity or implied promise does not so clearly arise, as he may be then presumed to have neglected taking such cession for their benefit and to have been contented with his personal right of action ;—and a stranger, not being entitled *de jure* to cession, can have no such equity.

Co-obligor paying in his own name.

b. Where the payment is made by the co-debtor in his *own name* and behalf only, or simply, i. e. without stating on whose account the payment was made, such equity or implied agreement arises, and cession may be obtained afterwards *ex intervallo.*

Co-obligor, taking Cession, succeeds to the Creditor's rights.

c. Cession of Action is only necessary to enable the co-debtor to proceed against his co-obligor or co-surety *in the same manner* as the *original creditor could*; but it is not requisite to enable him to sue his co-obligor or co-surety in his own name for their portions.

Established Practice.

The Supreme Court expressed its reluctance to make any decision which would alter or infringe upon any long established *practice* in the Profession, especially where such practice is consistent with well known principles of Equity, and when the deviation from it might be productive of extreme private injury and hardship. It was bound to administer the laws as they "subsisted under the ancient Government of the United Provinces;"* and even admitting that Van der Linden and the authorities on his side were correct, (viz. that according to the *modern practice* of the Roman-Dutch Law in Holland, if a debtor *in solido* had neglected to take cession at the time of payment, he could not obtain it afterwards,) it

Ancient Law of Holland—Modern Practice.

* Procl. of 23. Sept. 1799, confirmed by Ord. No. 5 of 1835.

might still be doubted whether that practice had been introduced into this Colony. The Court therefore guided by the opinion of Van Leeuwen in his Commentaries on the Roman-Dutch Law,* (which is alleged by Sir Alex. Johnstone† to be the work to which the *Dutch* Courts of Ceylon most usually referred, and to be the basis of the Civil and Criminal law of all the ceded Dutch Colonies,) consistent as such opinion is with the real equity and justice of such cases as well as the long-established practice in the Colony, decided in favor of the plaintiff's right to obtain Cession of Action from the creditor, notwithstanding her neglect to do so at the time of payment.‡

Case referred back, to enable

And *secondly*, the Supreme Court, guided by a former decision,§ by which a similar indulgence

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* P. 333.—*Censura. For.* p. i. lib. iv. c. 7. § 24, 25.—Voet. *ad. Pand.* lib. ii. tit. 14, § 14; lib. xlvi. tit. 1. § 30.—Vinn. *ad Inst.* lib. iii. tit. 17. § 1. n. 4.—Utr. Cons. ii. 150, § 3—24.—Groeneweg. *de LL. Abrog.* ad Cod. viii. 41. 11.—Sande *de Act. Cess.* vii. 11. 2.—Neostad. *Decis.* xii. p. 49.—Wassenaer, *Pract. Notar.* x. 23, 24, 25.

† Preface to Van Leeuw. *Comm.*

‡ The other authorities cited in the above Judgment are—V.d. Linden, *Inst.* p. 204, 211.—1 Pothier *on Contr.* 160, 291, 364.—Domat, *Civ. Law,* (ed. Strahan,) part. i. b. iii. tit. 3. sec. 1. art. 6, and note.—U. Huber, *Prælect. Jur. Civ.* tom. i. lib. 1. tit. 2. n. 8; tom. ii. lib. 17. tit. 1. n. 9; tom. iii. lib. 46. tit. 1. n. 8.—Voet *Compend. Pand.* xlvi. 1. n 12.—Costa *ad Inst.* iii. 16. sec. 1.—Wissenbach *de Fidejus.* th. 19.—U. Huber, *Hedend. Reghtsgel.* b. iii. c. 25. n. 17.—Lybrechts, *Reden. Vertoog.* d. ii. c. 34. sec. 10.—Decker *not.* 14 in Van Leeuw. *R. H. Rechtsgel.* b. iv. d. 4 sec. 15.—Damhouder, *Prax. Civ.* c. xlix. n. 1, 2.—Wassenaer, *Pract. Notar.* c. x. sec. 46, (Form of a Receipt and Cession of Action.) *Craythorne* v. *Swinburne,* 14 Ves. 162; *Parsons* v. *Briddock,* 2 Ves. 608; *Wright* v. *Morley,* 11 Ves. 12; *Harrison* v. *Glassop,* Coop. 61. Theobald *on Princ. and Surety,* 252, 269. Fell *on Guarantees,* 189—209.

§ Marshall's *Judgm.* p. 2. No. 14333, D. C. *Caltura*; See Civ. Min. 14. May, 1834. "The District Court was perfectly justified in dismissing the suit, the plaintiffs not being clothed with the character which would legally enable them to prosecute it; but considering that Letters of Administration may be considered as somewhat a novelty in some of the Districts, at least as a matter of absolute necessity, and considering also that the objection was not taken by the defendant till after the plaintiff's evidence had been gone through, the indulgence prayed for by the plaintiff, that the case may be postponed till the necessary steps are taken, instead of compelling him to undergo the expence and delay of instituting proceedings *de novo,* is not unreasonable." It was therefore ordered that the proceedings should be "referred back, to remain suspended until Letters of Administration should be taken out; and that the case be then resumed."

had been granted, allowed the plaintiff, on obtaining such cession, to avail herself of that benefit in the present action. This former decision related to the want of administration, but the observations made therein by MARSHALL C. J., were held to apply with equal force to the present case, considering the former practice in the profession and the proceedings in the suit.

plaintiff to obtain Cession of Action.

And *thirdly*, it was held that the evidence in the case was insufficient to support the plaintiff's claim *as against the Intervenients;* for the admission of the defendant could not affect the Intervenients, against whom the plaintiff should have fully proved that the sum claimed had been actually paid on her sole behalf out of her own private property. The only evidence adduced to establish this fact was a Fiscal's receipt, by which the payment appeared to have been made by the defendant himself, with an interlineation in a different hand-writing to the effect of such payment having been made on behalf of the plaintiff; and this was held to require much further explanation by clear and satisfactory proof in its favour.

Evidence of payment, as against Third parties.

And under these circumstances, the proceedings in regard to the plaintiff's claim of preference over the Intervenients, were referred back to the District Court to require the plaintiff to establish by sufficient proof that there were no available assets of her late husband from which the above judgment-debt could have been satisfied, and that it had been paid on her own sole behalf out of her own private property; and to allow her also to obtain and file her Cession of Action from the Creditor after amending her libel accordingly.—No. 3193, D. C. *Jaffna*, (C.)

428.—A District Court is not justified in erasing any part of its recorded decree, though it be called only a "note of what struck the Judge when reading over the case going into appeal."—No. 6499, D. C. *Colombo*, (C.)

Alteration of a Decree.

December 14, (R. St. C.)

429.—A plaintiff having, during the hearing of the case, called and examined a witness, and then

Waiver of one of the grounds of action.

intimated by her Proctor to the District Court "that as the talipot upon which the action was brought was not before the Court, she would not adduce any evidence in proof of it;" and having therefore proceeded to adduce evidence in support of her second ground of action, viz., a title by prescription; *Held* that she could not be allowed upon a subsequent day to adduce evidence again in support of her first ground of action, that being a distinct part of her case on which she had already gone into evidence on a former day, and had not only clearly failed to establish by proof, but was also considered on the above record of the proceedings to have been waived and abandoned.—No. 7519, D. C. *Kandy*, (C.)

Fiscal's Return. "Not to be found."

430.—A Return from the Fiscal of Jaffna on a Warrant, to the effect that "the defendant was gone to Aripo," which is within the same Fiscal's Province, was held not tantamount to the return of "not to be found."—No 2429, D. C. *Negombo*, (C.)*

Sequestration cannot be issued into other Districts.

431.—Sequestration cannot be issued into other districts under rule 15 of sec. I. This rule limits the Sequestration to property within the district in which the action is brought. Besides which, the subsequent proceedings,—such as calling on the defendant to appear, the dissolution of the sequestration in case of appearance, the entertaining the claims of third parties, and the staying of original proceedings pending such claims,—would all be very difficult of execution in a district foreign to that in which the action was brought. *Execution* indeed may issue into other districts (rule 36, sec. i.), but the same objections do not present themselves in that stage of the proceedings.—*Ibid.*

Waiver of Plea to the Jurisdn.

432.—The objection to the defendant being out of the jurisdiction of the Court in which the action has been brought, (cl 24 of the Charter,) may be considered waived by his appearance and submitting to the same.—*Ibid.*

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* See also Circular Letter of the 27th February 1834.

433.—Where the plaintiff, by his Libel, claimed only a specific sum of money, as house-rent, and that the defendant might be condemned "to deliver over the house and pay costs of suit;" *Held* that the District Court could not give judgment for subsequent arrears of rent; and *per* CARR J.—"The Libel has not even the usual concluding prayer for 'such other relief as the Court may deem meet,' upon which the decree for subsequent arrears might be supported."—No. 12126, D. C. *Colombo, N,* (C.)

Claim of a specific sum—Subsequent Arrears.

Prayer for further Relief.

434.—The Supreme Court expressed its reluctance to refer back a trifling case for further evidence, where it felt satisfied of the *moral* justice of the decision appealed against; but *held* that a defendant had an undoubted right to insist upon the claim brought against him being *legally* proved, though he might probably incur only further expense by the objection.—*Ibid.*

Deft.'s right to insist upon *legal* proof.

435.—Though there is no express general order in the Rules and Orders on the subject of reviving a suit which has abated by the death of either of the parties, it has been the settled practice of the District Courts of Colombo, upon any party (either plaintiff or defendant) dying, to allow the old suit to be revived instead of another action being brought; and where a plaintiff had died pending the suit, a party applying to be allowed to revive it, was *held* entitled to do so, on his proving to the satisfaction of the District Court that he was the sole administrator of the deceased plaintiff. The Supreme Court had, on a former occasion, upon a reference from the District Court of Madawellatenne, expressed its opinion* as to the practice in such cases, that "if a plaintiff, upon a suit having become abated by the death of the defendant, should persist in bringing a fresh action, without being able to shew good cause for so doing, the costs incurred by such unnecessary proceeding should be borne by the plaintiff."—No. 2874, D. C. *Negombo,* (C.)

Revivor of a suit abated by the death of a party.

Fresh Action without revivor—Costs.

* Letter Book, 9th Oct. 1834.

Malice, when implied.

436.—Where a charge appears to have been clearly false and *without* any *probable cause*, the Law will imply malice.—No. 3361, D. C. *Chilaw*, (C.)

General Denial—Defence.

437.—Where the defendant had omitted to plead the 21st clause of the Ordinance No. 3 of 1834, or the 5th clause of the Ordinance No. 8 of 1834 in bar of the plaintiff's claim, but had only put in a general denial by Answer; *Held* that the case should be decided on the evidence adduced therein.—No. 10419, D. C. *Colombo*, *N*, (C.)

Dec. 21. (R. St. C.)

General Denial—Burthen of Proof—viz. Possession—Title—Value—Damages.

438.—Where the defendant by his Answer "denies the *claim* set forth in the plaintiff's Libel," it is incumbent on the plaintiff to prove every necessary allegation or fact therein in support of his claim. In an action to recover a carriage claimed by the plaintiff from the defendant, it was *held* that, upon the foregoing answer, the defendant's possession of the carriage being admitted, the plaintiff should have proved his title thereto and the value thereof when the defendant first took it; or if he wished to recover back the carriage with a compensation for damages which it had sustained since it had been in the defendant's possession, that he should have adduced satisfactory evidence of such damages. Where no proof of the value of the carriage or of the damage done thereto had been offered, the utmost that the Court could decree, supposing the plaintiff's title to the carriage proved, would be the restoration of the carriage with costs of suit.—No. 3253, D. C. *Chilaw*, (C.)

Administration to deceased's Wife's estate—Delay.

439.—The Husband has a preferable claim to administration of the estate of his deceased Wife, and should not be deprived of it owing to a delay in applying for it, which may have arisen from error, if he be willing to rectify it upon giving security and taking out Letters of Administration within a short time (twenty days.) And as regards the guardianship of children, it could be only under very strong circumstances indeed against the character and conduct of a Father, that the Supreme Court would allow him to be

Guardianship of the children.

deprived of his child, of which he is the natural guardian, and appoint another person to be her future guardian.—No. 10, D. C. *Amblangodde*, (C.)

440.—Where, after the death of the wife, the husband, previous to obtaining administration to her estate, had, for himself and as guardian of his minor child, brought an action [in respect of property belonging to the common estate,] the Supreme Court allowed the husband time to obtain Letters of Administration to his wife's estate.—*Ibid.*

Administration pending an action.

441.—The rule laid down in No. 128, D. C. *Chavagacherry*, (4th June 1834,) and No. 2587, D. C. *Ruanwelle*, (20th Jan. 1836,) in respect of the *double* sum payable under the Government conditions as penalty for having reaped without due notice (viz. that these conditions form a mere contract between the Government and the Renter, but are not binding on third parties further than such parties may by their own acts have made themselves responsible to Government and the Renters,) was repeated in No. 792, D. C. *Tenmoratchy*, (C.)

Conditions, not binding on Third parties.

442.—No alteration or insertion ought to be made in the minutes of evidence at the time when the witness is under examination; and no omission in recording the depositions (if due attention be paid,) can possibly occur, which would not be capable of a very short interlineation; for if a witness subsequently corrects his former evidence or is recalled for further examination, such additional evidence must not be recorded by an alteration of the former statement or by inserting it on the margin of his former depositions, but should be duly recorded in the stage of the written proceedings in which it was made.—*Ibid.*

Mode of recording depositions.

Dec. 28.

443.—On reading a letter from the District Judge of Galle transmitting a case which had been heard in appeal, together with the decree passed therein by the Supreme Court on the 12th November, it was ordered that the clerical error

Alteration of a clerical error in a Decree.

pointed out by the District Judge in the said decree as to the date of a deed thereby required to be proved, should be amended, by the year 1831 in the date of the said deed (mentioned in the 7th line of the decree) being altered into the year 1834.—No. 2689, D. C. *Galle*, (C.)

Dec. 31, (R. J. St.)

The Hon'ble JOHN JEREMIE, Esquire, was sworn in as *Senior Puisne Justice.*

1837, *January* 4, (R. J. St.)

1837.

Action for Defamation.

444.—In an action for damages, brought by the plaintiff (*Bastian Pulle,*) against *David Hugens,* it appeared that the plaintiff had been hired into the service of *Colonel Arbuthnot* by that gentleman's head-servant, having some months before been in the domestic employment of the defendant, who had dismissed him for alleged misconduct of a serious nature. The defendant, on hearing of the plaintiff's engagement at Col. Arbuthnot's, had written the following letter to him, which led to the dismissal of the plaintiff:—"*New Bazar,* June 7, 1836. Sir, I hope you will excuse the liberty I take in addressing you; but having been informed that you have engaged a servant by name Bastian Pulle, I beg to apprize you that he was in my service for the last five months, and that I was obliged to discharge him on account of his dishonesty, having been robbed of plate to the amount of Rds. 200, under circumstances which leave no doubt as to his being the thief. Since this occasion I have been most credibly informed that plate has been abstracted from several families in which Bastian Pulle was at the time employed as a servant. I therefore feel it my duty to inform you of the above circumstances, in order that you may take means to prevent a similar loss with yourself, and also to prevent a servant so deserving of punishment from obtaining employment of which his past behaviour shews he is so unworthy. Should you have any doubts as to what I have stated above, I will be happy to acquaint you with all the particulars I know regarding this man's dishonesty; and should these prove unsatisfactory, I beg to refer you to *A. W. Archer* Esquire. I remain, Sir, &c., *David Hugens.*" To this action the defendant alleged three defences, viz. 1, that the information contained in the letter was communicated confidentially, and not with a view of injuring the plaintiff; 2, that

Defence—
1, Confidential communication;
2, Justification.

3, Truth in mitigation of Damages.

what was therein stated was true; and 3, that if the truth was not admissible as a complete justification, it should at least be admitted in mitigation of damages. At the trial, the letter being admitted, as well as the fact of the plaintiff having been discharged from Col. Arbuthnot's service in consequence of it, the defendant was allowed to go into proof of the facts therein stated, viz. the absence of any malice in writing the letter, (one of the witnesses deposing that the defendant had previously consulted him as to the propriety of informing Col. A., as a stranger to the country, of the loss mentioned in the letter,) and the fact of a strong suspicion having been entertained against the plaintiff by the defendant and others The Court below* hereupon gave judgment, (*E. P. Wtlmoi*, one of the Assessors, *dissentiente*,) 1, that the letter tended to the infamy of the plaintiff, and had been written with the deliberate intention of injuring the plaintiff by getting him dismissed from the service he then held, and preventing him, as far as defamation of character would avail, from procuring another situation as a servant; 2, that the defendant having previously discharged the plaintiff from his employ, without publicly charging him with theft for the sake of justice, or taking any legal steps against him, had no right to accuse him in private and to calumniate him behind his back upon mere suspicion; and 3, that in an action of injury for written defamation the truth of the imputation was no excuse, and could not be admitted either in justification or in mitigation, where the plaintiff concludes merely for pecuniary reparation, unless where the defamatory matter related to some offence, which it was the interest of the public should be made known, and the communication were made to a Magistrate or other person in authority for the lawful pur-

Evidence.

Judgment of the District Court.

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* *D. A. Blair*, D. J., and *D. J. F. Dias*, *E. P. Wilmot* and *H. C. Prins*, Assessors.

pose of bringing the person accused to justice.* And thereupon the defendant was condemned in £15 as damages and the costs of suit.

Judgment in Appeal.

On an appeal against this decision, the Judges of the Supreme Court affirmed it, but delivered their judgments severally; and as these are not recorded in the Minutes, the original MSS. being merely filed separately in the Draft-Judgment Book, they are here given severally in a digested form:—

ROUGH C. J.—The question for enquiry is whether the plaintiff's action is maintainable, and whether he is entitled to recover damages against the defendant. The defendant writes to Col. Arbuthnot stating his own conviction of the plaintiff's misconduct, with the view of protecting Colonel Arbuthnot's interests and to prevent the plaintiff from being retained by him. And it is argued that this was merely the performance of a duty, and was unaccompanied by any malice; and that, being a confidential communication, which he the defendant had a right to make, and being founded in the belief of its truth, he cannot be held responsible for it. But if in its form and structure of expression, it bears upon it evident marks of an intention unduly to injure, it is not because it is termed and designed to be confidential, that protection must therefore be extended to it. Such a communication is not the less libellous, because meant only for the ear of the individual whose conduct it is intended to guide and sway. But it is urged again that circumstances may rebut the inference of malice; that the letter being openly signed and subscribed by the defendant, and the previous consultation entered into by him with respectable individuals as to the propriety of sending such a letter, tend to demonstrate that a sense of public or private duty alone was the motive influencing

* Grot. *Introd.* iii. 36. § 2.—D. Hamester, v. 2. t. 2, *de injur.*—Kersteman, *Acad.* c. ix.—Van Hasselt, *Crim.* b. ii. c. 19. § 6, 7, 13.—Voet, *Comm. ad Inst.* lib. iv. t. 4.—Van Zutphen, *Pract.* tit. *de injur.* § 4.—A. Gail, *Observ.* b. ii. obs. 99.—A. Corvinus, *Dig.* lib. xlvii. t. 10.—Lauterbach, *Compend.* lib. xlvii. t. 10.—A. Vinn. *Comment.* lib. iv. t. 4.—Van Leeuw. *Cens. For.* p. i. lib. v. c. 25. And see *Hopman* v. *Stork* decided in January 1825, (Giffard C. J.,) by the late High Court of Appeal.

this act. I confess however, after cautious mediation, I cannot but be of opinion that the declaration of the dissentient Assessor as to the candour which is due from one Englishman to another and the John-Bull honesty of intention which guided the conduct of the defendant towards Col. Arbuthnot, partakes more of the zeal of an Advocate than the calmness of a sworn Juror. In opposition to this, I have the judgment of the District Judge and the two other Assessors, and I am to express my own opinion upon the letter itself. It is clear from the evidence that this letter was a work of great deliberation, and it is idle to talk of it as the character of a Servant given by his Master. It is not indeed pretended that it is such; and it seems to me impossible not to feel that the existing motive for thus writing, though it be to serve Colonel Arbuthnot, is yet at the same time more effectively apparent, injuriously to prevent the employment of the plaintiff. It must always be borne in mind that however impressed the defendant's mind was with a conviction of the plaintiff's wrong doings, he yet made no effort whatever to bring him through any magisterial enquiry to justice; and yet, having avoided to do this, he in the most undoubting manner communicates to Colonel Arbuthnot his suspicion, as if suspicion was equivalent to proof. He scarcely leaves it to Colonel Arbuthnot to form a judgment, but boldly affirms what after all can only be suspicion; and not only does he state his belief as to that in which he himself has a personal concern, but he goes out of his way to insinuate charges, the truth of which he possesses no means whatever of being at all assured of. I cannot think this a letter which should have been written on such an occasion, and to this act of writing such may well be applied the maxim cited by the Senior Puisne Justice, that it is *imprudentia dolo proxima.* But again a justification of this letter is sought to be founded on an allegation that the plaintiff was by common consent a man destitute of all character, and therefore not entitled to recover damages at the hands of justice for any injurious expressions used towards him.

The proof of this has however utterly failed; for not only had he a character sufficiently good to entitle him to be recommended to service by Col. Arbuthnot's butler, but the very charge brought against him was founded on suspicion only; and where there is a possibility of doubt, it cannot but be dangerous to assert criminality in the uncompromising manner in which this has been done. It is scarcely necessary, under these circumstances, to enquire whether or not the District Judge has betrayed some inconsistency in receiving evidence, and entering upon the merits of the case, and yet giving as his judgment that in cases of written injury the truth of the slander cannot be received in justification, and scarcely in mitigation of damages. In the case decided by Sir *Hardinge Giffard* it appears to have been laid down by that learned Judge that the truth of an allegation can be received in justification neither of verbal nor written slander; but he admitted evidence in mitigation of damages. In modern Roman-Dutch Law, the opinion seems to prevail that in cases of verbal injury, truth may be given in evidence, perhaps in justification, certainly in mitigation. *Van der Keessel*, Thes. 803. In *Titterton* v. *Armstrong*, decided in 1831 by the then acting Chief Justice (Sir *Charles Marshall*,) it seems not to have occurred to him that written injurious slander might not be justified, were the facts stated proved to be true. The cases are not however irreconciliable; and this point does not require to be gone into on the present occasion, conceiving this letter to be an unguarded, rash and in many material respects unfounded, and therefore in a legal view a malicious, communication, I think the judgment of the District Court must be affirmed.

Jeremie J.—Whilst confirming the decree of the District Judge, I differ so materially from him on the Law, that it appears but right to guard against the possibility of my sentiments being mistaken on a point of so much importance. I concur in the opinions of the two very learned Justices who determined in two preceding instances cases of this nature, that of Sir *Hardinge Giffard* in the case of *Hopman* v. *Stork*, and of

Sir *Charles Marshall* in *Titterton* v. *Armstrong*. And I not only conceive that there is no discrepancy in their opinions, but I also incline to think that their sentiments are in perfect harmony with the law of this country.

The legal question subdivides itself into the following points:—1, Is the Court in cases of Libel to be guided by the principles of the English Law or the Roman-Dutch Law; and 2, What is the actual difference between these laws on subjects of this nature?

It is, I conceive, an unqnestioned doctrine that the laws of a conquered country are silently adopted by the conquerors, even if there were no express capitulation; and therefore that it requires a positive law from the conquerors to change, alter or amend the law as it stood at the period of the conquest. In this Colony there is no such positive law or regulation with regard to cases of libel. True it has been enacted by a recent Ordinance* that the English Law of Evidence shall be observed in this country, but the question here is one of pleading and not of evidence. The question is not what evidence shall be sufficient to prove the truth of a libel, but whether the truth can be pleaded at all as a justification. And for this we must have recourse to the Roman-Dutch Law, which was avowedly the law of the country at the period of its capitulation.

But then comes the *second* question, what says the Roman-Dutch Law on this point; or, as I have already stated it, in what respects does it differ from the Law of England? The law of England admits of two kinds of action for Libel,—the one exclusively civil, and the other as exclusively criminal; the one having for its sole object a reparation in damages to the party offended, the other the suppression and punishment of a public offence. In the civil action, the truth may not only be given in evidence if pleaded, but is under all circumstances in itself, if proved, a complete reply to and justification of the Libel; whilst in the criminal action, it can neither be pleaded nor given in evidenee, and if taken into consideration

* No. 6 of 1834.

on affidavits filed after a verdict of guilty has been actually pronounced by the Jury. The Roman-Dutch Law on the other hand admits of none of these technicalities. It does not admit that the truth alone is of necessity a sufficient reply to any libel, and therefore it does not allow the truth to be pleaded in justification; but it does not thence follow that the truth may not be given in evidence; when it may be received in mitigation of damages, occasionally also in justification, and at other times, though rarely, in aggravation, where for instance a person of station, honor and respectability, but labouring under some bodily deformity, has been held up to public ridicule, insult and contumely, owing to such deformity. On the other hand, suppose a man guilty of some serious offence or of a tainted character, who is likely to obtain a trust where he may have an opportunity to renew his culpable practices; here the occasion being such as to warrant the communication of the truth by a person of ordinary discretion, the truth will under these circumstances amount to a sufficient justification of the act, for here the two following circumstances combine, viz. the occasion was sufficient to warrant the communication, and the communication is substantially true. In a word, the truth is considered an important element in forming a right judgment of the motive by which the defendant was actuated; but it is only an element, and cannot therefore be exclusively pleaded as a sufficient reply to any defamatory publication. And so in effect has it been viewed by Sir *Hardinge Giffard* and Sir *Charles Marshall.*

I am aware that at a period not perhaps very remote, the doctrine which still prevails in the criminal courts of England was held by many writers of eminence on foreign jurisprudence, was adhered to and strictly laid down during the middle ages, and is supported by some texts in the *Corpus Juris.* But it is by no means clear that this was the general doctrine of the Roman Law; whilst it is tolerably clear that a jurisprudence more conformable to equity has now very generally obtained in the continental courts, whose

laws, like the laws of this country, have the Civil Law as their basis. And when this doctrine is further confirmed by the concurrent judgments of the Supreme Court, on two important occasions, there seems to be no necessity for recurring in this exclusively civil action to principles in a great measure obsolete.

It appears therefore that evidence ought to have been gone into; that it was correctly taken by the Court below; and that there is an error in the judgment of that Court, inasmuch as the Judge has refused to take cognizance of the evidence, but has proceeded to determine the case without reference to the truth of the charges contained in the letter. But these charges are not proved, and we are therefore bound to believe them not true. And the laws of every country, the very well-being of Society, command that conduct so rash and ill-advised, not to say wanton, as that of the defendant should not pass unchecked; and that if injury has been suffered, as it undoubtedly has been, adequate reparation should be made.

Stoddart J.—In the defence which has been offered in this case, certain averments have been made, the competency, the evidence and the effect of which are all equally disputed. The *evidence* must be estimated by the rules of the English Law of Evidence, which under certain limitations is the law of this Island by a recent Regulation. The *effect* must be determined by the Roman-Dutch Law, as administered in Ceylon at the period of the Conquest in 1796. (*Clark* on Colonial Law, p. 4, ed. 1834.) It has been plausibly argued for the plaintiff that though the *effect* of the averments is to be decided by our Common Law, we must determine their *admission to proof*, as a question of proof, by the English Law. I apprehend however that the Law of Evidence does not determine the nature of the averments that may be established by evidence, but the nature of the evidence by which averments may be established. I have therefore no difficulty in concluding that the competency of the articles of this defence is not affected by the Regulation.

By the Roman-Dutch Law, the civil remedy against Slander consists of two actions, usually, but not necessarily, conjoined,—the *actio ad Palinodiam* and the *actio ad Injuriae Aestimationem*. The former was unknown to the Roman Law, but the latter is in every respect the same as the civil action of Damages under the Prætorian Edict, in the general case of slander, and under the *Lex Cornelia de injuriis*, in the instance of defamation by writing. The words of *Van der Linden* might indeed have led us to believe that the object of the Dutch *action for profitable amends* was the infliction of an arbitrary fine payable to the poor; but the language of *Van Leeuwen* is more accurate:—"which amount is *mostly* desired for and on behalf of the poor." But *Voet* and the other authors, who have treated this subject more fully, clearly shew that the action is no other than a *civil action for damages*, to be estimated strictly by the actual injury, and appropriated in the way most agreeable to the party injured,—*ad injuriae illatae aestimationem, sibi, et, si ita velit, pauperibus applicandum.* This is a precise definition of the Roman action; and this Dutch *action for profitable amends*, when it arose out of *written* slander, was governed in the Courts of Holland, and must be governed here, by the Roman practice under the *Lex Cornelia de injuriis.* The *Lex Cornelia* was enacted by *Sylla* the Dictator to provide against all the more aggravated injuries. After enumerating certain real injuries of a serious nature, it specified *injuries to character by writing*, and it provided a *double* remedy,—a criminal action for a public penalty, and a civil action for damages proportioned to the actual injury. The latter was strictly an *actio ex delicto*, an action arising from misconduct in the legal sense. It therefore necessarily supposed misconduct in one party and injury done to the other. The misconduct without the injury, or the injury without the misconduct, gave no room for the action.

Under this view of the law, I apprehend that the ultimate points to be determined are only two:

1, To what extent has this letter hurt the feelings or injured the reputation of the plaintiff? and 2, Was it written with a malicious intention to defame, *or* with such negligent or wanton disregard of the just rights of the plaintiff as is held *in law* equivalent *in its civil consequences* to such intention?

Whether the letter was intended to be confidential, whether it was calculated to be so considered, whether the defendant had reason to believe the allegations it contained: these are enquiries that only form a part of the question as to his *malice* or culpable negligence. On the other hand, whether the letter was actually understood as confidential, and so used; whether the allegations in it are true, and whether their truth was generally believed by others before the letter was written: these are enquiries that only form part of the question as to the existence or amount of the *injury* sustained. If no injury has been sustained by the plaintiff, or if no culpable conduct can be proved against the defendant, (taking the word *culpable, in its legal sense,*) the action must be dismissed for we must have *both* to justify us in acceding to the prayer of the plaintiff.

A discussion has been raised, as to whether it is competent to plead the truth of the libel, or common fame, or the confidential nature of the communication, in answer to the present suit. I have no hesitation in saying that under the *Lex Cornelia*, all these might have been pleaded in the civil action, *but only in as far as they went to prove* either injury to the one party, or misconduct in the other.* Rules indeed were admitted in the *criminal* action, at different periods in the history of the Law, which had no place in the administration of the *civil* remedy. Into these I conceive it quite unnecessary to enter. The doctrine of *Paulus* on the one hand—*eum qui nocentem infamavit non esse bonum equum ob eam rem condemnari,*—and the edict of *Valens* and *Valentinian,* on the other, which reprobated the publication of defamatory writings, even when true, had both *exclusive* reference to the *criminal action.* The law of *Constantine,* which *required*

* *Sic.*

at all, it can only be by 'the Court in mitigation, the publisher to prove its truth, and declared nevertheless that even if the proof was complete, he should still suffer a certain degree of punishment, is also exclusively applicable to the *criminal remedy*; and besides, though it has been frequently cited by modern Jurists, being found only in the *Theodosian* Code, is no part of the Roman Law of modern times. Upon the whole therefore, I have no hesitation in my opinion, that by the Roman Practice in the civil action, all the circumstances I have enumerated may be pleaded, but only in as far as they mitigate the misconduct of the defendant or the injury done to the plaintiff. In the criminal action, I incline to the conclusion of *Fachinœus*, that the truth of the libel was taken (in the time of *Paulus* at least,) as a *presumptio juris et de jure* of the absence of malice; but I find no trace of any such rule in the civil action at any period in the history of the Roman Law.

Then as to the *confidential nature* of the communication, it is true that by the Roman Law certain kinds of privileged communication did give rise both in the civil and the criminal action to a *presumptio juris et de jure* of the absence of malice; and, on general principles, it is also clear that any degree of confidence in a communication does in some degree affect both the natural presumption of malice on the one hand, and the actual degree of injury on the other. But I find no such rule in the Roman Law as that in all communications, in any degree confidential, one may plead the confidence as a *full justification* in a case of libel.

Let us come then to the two main questions upon which all the others depend; and *firstly*, I do not think it can bear question that an injury has been done, not merely an injury to the *feelings* of the plaintiff, but a substantial injury to his character and prospects. If he had been a man totally and notoriously without character before the publication of the libel, it is certain that we could have given little or no damages, because little or no injury could have been done. But it is not my individual opinion, and it is not the opinion of the Court that any thing amounting to that has

been proved. And *secondly*, as to what in the language of the law is termed the *malice* of the defendant;—we must remember that this is a civil, not a criminal, action. It is an action indeed arising out of conduct reprobated by the law, but there is a broad distinction between a crime and conduct which is simply illegal. The *animus defamandi*, which must be proved in the criminal action, i. e. the vindictive purpose to defame, which constitutes the criminal offence, is a deep stain on the moral character of the offender justly visited by the reprobation of all good men. But the *animus defamandi*, which must be proved in the civil action, includes not only a vindictive purpose to defame, but also all culpable negligence whereby the character of others is affected and may possibly amount rather to an imprudence than to an offenee. I should find difficulty in saying that the conduct of the defendant has exhibited a deliberate and vindictive purpose to ruin the plaintiff, or that no better motive entered into his mind when he wrote the letter which has given rise to this action. That in writing it he was actuated chiefly by a spirit of kindness to Col. Arbuthnot as his fellow-countryman and a stranger in the Colony, I think extremely probable; and that he believed the plaintiff to have acted ill, I have no manner of doubt. But it is sufficient to the judgment in this civil action, if the defendant have shewn either a culpable negligence in forming his opinion on the plaintiff's character or a culpable imprudence in communicating that opinion to others. And the Court is unanimous in its conclusion that whether the plaintiff be a man of purest conduct or not, the defendant was culpably imprudent in publishing to Col. Arbuthnot, however confidentially, the positive averments against his character which are contained in the letter, if he proceeded upon no better evidence than that which he produced to the District Judge. We are bound to believe that he produced the best evidence in his power, and we are therefore of opinion that judgment of the District Judge should be affirmed.—No. 12838, D. C. *Colombo*, *S.* (Coll.)

445.—The 29th rule of sec. i. of the *Rules and Orders* leaves to the District Judge an entire discretion as to allowing or disallowing the cross-examination of the litigant parties at any time required.—No. 2153, D. C. *Matura*, (R.) Examination of Parties.

Jan. 18, (R. J.)

446.—In an action on a Bond, against which the defendant pleaded Prescription, an attempt had been made on the part of the plaintiff to prove payment of interest within the term prescribed. The Supreme Court pronounced judgment in the case as follows;—" When a *prima-facie* legal right is fully established, the evidence in disproof of that right should be clear, consistent and perfectly satisfactory. 1, The endorsement on the bond (of a payment of interest) has been avowedly made by the plaintiff; it therefore signifies nothing; for he cannot create a title for himself; 2, the offer of a compromise proved by two of the witnesses, also signifies little, supposing it to have been made; for every man is at liberty to endeavour to purchase his tranquillity at a sacrifice; and this does not change the relative position of the parties, if he should fail in the attempt: 3, the depositions of the two other witnesses for the plaintiff, to the actual payment of interest, are more in point; but the witnesses are the plaintiff's relatives; they differ from the statement in his Libel as to the amount paid, and are contradicted by the three witnesses for the defendant, who concur in all particulars and swear to a full satisfaction of the bond; and 4, when to this is added the fact that the bond was accompanied by a mortgage, which the plaintiff might have availed himself of for the last six years, but which he never attempted to carry into effect; not only is this a case which the law of Prescription is particularly calculated to meet, but the balance of probability on the testimony appears also in favour of the defendant; and the decree is therefore reversed with costs."—No. 2416, D. C. *Caltura*, (J.)

Prescription.

Evidence in disproof of a prima-facie right.

Offer of a Compromise.

Jan. 25, (R. J.)

447.—On the 17th October 1832 a writ of execution under a decree No. 2562, of the Sitting Fiscal's Sale.

Magistrate of Jaffna, was issued at the suit of *A. Mootayan* against *Supen Winasy* and others. On the 20th Dec. a certain garden called *Seroepoe-totem,* in extent 16 lachams, seized under the writ, was sold by the Fiscal to the plaintiff in No. 3685 for the sum of Rds. 30, the Fiscal making an entry thereof on the Notice of Sale, and depositing the purchase-money (*minus* the charges) in the Cutcherry. In his return of the sale, however, he reported that one *Neyna Sinnewen* had *after the sale* made a claim of Rds. 50 on the land in right of *otty*, on a bond dated 16th Aug. 1821; and therefore on the 1st June the writ was returned for investigation of the claim. In the meanwhile however, on the 22nd March 1833, a certificate of the sale in conformity with the above entry was given to the purchaser.

Claim and Opposition.

At the investigation of the claim on the 7th June 1833, the claim of *Neyna Sinnewen* was admitted by the original debtor (the defendant in No. 2562); and the following entries were made in the proceedings:—" The amount of the writ appears by a receipt granted by the plaintiff therein to the Fiscal *to have been fully acquitted;* and the plaintiff says he has no claim whatever on account of the writ. There appears to be in deposit in the Cutcherry the sum of £2. 4*s*. 6*d*. being proceeds of the sale of the land of which the claimant lays claim to 9 lachams, as having been ottied to him for £3. 15*s*. The land appears to have been sold for £2. 5*s*. only, when the otty-claim far exceeded it. The claimant is therefore entitled to hold the land in otty until the otty-condition be satisfied." The distribution of the purchase-money was thereupon stopped, and proceedings were commenced by the plaintiff in No. 3685, which was an action by him as purchaser at the Fiscal's sale against the otty-holder *Neyna Sinnewen*. In this case the plaintiff proved the purchase by him at the Fiscal's sale, and the refusal of the defendant (*Neyna Sinnewen*) to deliver the ground-share to him, whilst the defendant on his part proved his possession for some years past and the execution of the otty-bond; and the sons of the original debtor, on being ex-

amined as witnesses, declared that they had refused to allow the land to be sold by the Fiscal, having paid and satisfied the debt previous to the sale. This statement was confirmed not only by their having continued in the possession of the unottyed share of the land, but by the Fiscal's own statement (as above) that the amount of the writ appeared by a receipt granted by the plaintiff to the Fiscal to have been fully acquitted. And under these circumstances the District Court annulled the original proceedings by cancelling the Certificate of Sale.

Cancellation of Fiscal's Certificate.

On appeal, the Supreme Court pronounced the following judgment:—" The cancellation of the certificate may or may not be requisite; but if requisite, it can only take place in presence of all the parties to these proceedings, and also in the presence of and after having fully heard the Fiscal. But especially do the interests of public justice and the public faith command that the plaintiff be first completely indemnified in principal, interest and full costs at least. He has purchased at the bar of the Court, and the Court is bound to see that he be not a sufferer by his confidence in it. The only question therefore is whether a secure title can be made out for the plaintiff, or who shall indemnify him, if it cannot: and for the purpose of determining this point it is decreed that the judgment of the Court below be reversed, the Certificate having been, under any circumstances, prematurely cancelled and the plaintiff unduly condemned in costs. And it is further decreed that the present case No. 3685 and the case No. 2562 be conjoined, the parties to either being rendered parties to both; and that the Fiscal, under whose authority the sale was effected, and who delivered the certificate of Sale, be rendered a party intervenient in this case; the further hearing to take place before the Supreme Court on Circuit."—No. 3685, D. C. *Jaffna*, (J.)

Order for Consolidation of two Suits.

February 1, (R. J.)

Rights and Duties of Landlords.

448.—Where a party, a *Dessave*, claimed the power " to turn out the *nille*-holders of his estate whenever he pleased," the Supreme Court refused

to recognize such a pretension; and as the tenure of the lands in question was an admitted fact, *held* that the lord of the soil was bound to respect the rights of his tenants, whatever they may be, as fully and completely as they are to respect his; and that even if the lands were his property in fee, the moment the tenant had entered with his consent, he could no longer eject him in the above summary manner.—No. 794, D. C. *Ratnapoora*, (J.)

Fine for vexatious Appeal.

449.—A decree of a District Court against which an appeal had been taken, was affirmed with costs, and by the unanimous opinion of the Court and Assessors, an additional fine of five shillings was adjudged against the appellant for frivolous and vexatious litigation.—No. 731, D. C. *Tenmoratchy*, (J.)

Feb. 11, (R. J. St.)

Presumption in favour of the Possessor.

450.—A person in possession is presumed to be the proprietor until the contrary be shewn.—No. 1760, D. C. *Matura*, (J.)

Proof to establish a Mortgage.

451.—Where a mortgage is alleged, the deeds should be produced and proved, or the cause of their non-production satisfactorily accounted for; and where no attempt of the kind had been made, but witnesses had only been called as to certain isolated statements of a deceased person; *Held* that such testimony had been justly deemed unsatisfactory by the Court below.—*Ibid.*

Action for Libel—Defamatory words.

452.—In an action for Libel, the plaintiff should set forth the immediate tenor, if not the exact words, of the libellous matter charged.—No. 14321, D. C. *Colombo, N.* (J.)

Rules of Practice and Pleading, in Colonial Courts.

453.—There can be no question that the Rules and Regulations set down for the guidance of District Courts should be strictly observed; and it is advisable in all cases to put an early period to frivolous or vexatious litigation. But it was a settled principle with Lord Stowell, in determining Admiralty Appeals from the Colonies, not to tie these Courts down to the rigid forms of pleading or rules of proceeding adopted in the Superior Courts of Law; but to look to the sub-

stantial merits of each cause, guarding at the same time against any undue laxity of practice,—a maxim, which appears not inapplicable to the proceedings of the District Courts in Ceylon.—No. 2191, D. C. *Negombo*, (J.)

Action on a Deed, which had been proved to be a forgery and been cancelled.

454.—In an action (No. 5691) before the Provincial Court of Jaffna, commenced in May 1832, one *Walliammy* and her daughters, as plaintiffs, claimed by right of inheritance a part of certain lands, which they stated the defendants (her brothers and sisters,) unjustly withheld from her. The defendants in their Answer stated *inter alia* that a considerable portion of these lands had been given in otty to the third defendant, *Mayly*, by her brothers and sisters, including the first plaintiff (*Walliammy*)'s husband, on a dowry-bond dated November 1818; which deed the plaintiffs in reply maintained to have been forged for the purpose of defrauding them. At the trial, it appeared in evidence that the parties had ottied a considerable portion of the lands, but that on the other hand there was great reason to believe that the defendants had attempted to deprive the plaintiffs of their fair share of the remainder, and that the deed then produced had been forged; and the Court thereupon caused it to be cancelled, and decreed that the plaintiffs were entitled to their share in the property mentioned in the cancelled Bond, (which share by the death of the fourth defendant without issue, had in the meantime become augmented to one-fourth.) In a subsequent action (No. 608) the children of the late *Mayly* (the third defendant in the former suit,) claimed as against their co-heirs, the former joint defendants and plaintiffs and their representatives, the amount of the very deed thus cancelled, and introduced into their action as additional defendants the two principal witnesses in the former case, who, they alleged, had given untrue evidence to their prejudice. They further stated that the then Governor had, under the former system, made an order that the case No. 5691 should be heard *de novo*, but that they were unable to obtain a copy of the direction to that

effect. This case having come in appeal, the Supreme Court pronounced judgment in the following terms;—"It is perfectly clear that the action in its present shape cannot be maintained against the 3, 4, 5 and 6th defendants (the plaintiffs and witnesses in the former case,) as no proof has been tendered of the order for rehearing of No. 5691, and if it had been, that very circumstance would render a second action unnecessary. It appears indeed that the joint defendants to the former suit (the present first and second defendants,) who then maintained the validity of the deed, now deny it; and it cannot be doubted that whether that deed be true or forged, all the defendants in that suit equally declared it true. The decree in No. 5691 is final and irreversible, inasmuch as related to the full one-fourth share of the then plaintiffs (the present third and fourth defendants,) and the bond was cancelled with reference to them. But the other parties claimed nothing at the time from the then third defendant (*Mayly*,) and nothing could therefore be awarded. There is reason to conjecture from the evidence and the ancient possession of the plaintiffs that they had really once possessed an otty-deed, which being lost, they could contrive no better expedient than to draw up a new one. This as regards the then plaintiffs was most justly reprobated by the Court, which with equal justice awarded them their full share of the estate and cancelled so fraudulent a document; but as regards fraud or no fraud on the part of the other defendants, they were all parties to it and fully acknowledged the deed. The parties therefore stand thus;—the otty-deed is invalid as regards the plaintiffs in No. 5691; but it continues in full force with respect to *all* the then defendants in regulating their rights as against each other. The decree in No. 608 dismissing the plaintiff's claim, is therefore affirmed with respect to the 3, 4, 5, and 6th defendants, and reversed as to the 1st and 2nd defendants; and the plaintiffs are allowed to resume possession of that portion, if any, of the lands, which the 1st and 2nd defendants have admitted to have been ottied by themselves to their sister ***Mayly***

Res Judicata. Effect of an Order for Re-hearing.

A party to a fraudulent deed estopped from disputing the rights accruing under it.

in dower and of which they have since assumed possession under the decree in No. 5691, that decree being in this respect foreign to them."—No. 608, D. C. *Tenmoratchy*, (J.)

455.—Where it appeared that the plaintiff in a suit had been a party to a previous suit against the same defendant and in respect of the same subject-matter; but that such former suit had been conducted by B, the first plaintiff therein, "for himself and on behalf of his nephew A.," the Supreme Court thought it requisite to ascertain whether A., the present plaintiff, was really a minor at the time, and if so, what authority B. possessed to represent him; and referred back the case for that purpose.—No. 1806, D.C. *Tenmoratchy*, (J.)

Former decree. Authority of a party to sue on behalf of another.

Feb. 13, (R. J. St.)

456.—Where a party had in the first instance neglected to file certain criminal proceedings or to produce further evidence in support of his case, the Supreme Court in appeal considered that it would be of inconvenient example to send back the case directing the District Judge to admit such proceedings or to hear further evidence therein, the neglect not appearing to be attributable to the District Judge himself.—No. 665, D. C. *Negombo*, (R.)

Non-production of evidence by Appellant—no ground for a New Trial.

457.—In a case in appeal from Manar, wherein it had been ordered that evidence should be heard before the Supreme Court,* Rough, C. J. having, during the hearing of the case, proposed to withdraw, Stoddart, J. objected to the case being heard in the absence of the Chief Justice, even with the consent of parties, as being in his opinion a course contrary to the terms of the Charter of 1833. He also objected generally, for the same reason, to any case from a District Court within the boundaries of the circuits being heard at Colombo otherwise than by the Judges collectively. But it was determined by the Chief Justice and Jeremie J., (being a majority of the Court,) that by the practice all cases appealed and delivered into the Registry or in the Registry whilst the

Constitution of the Supreme Court.

Civil Jurisdiction at Colombo.

* 21. December, 1836.

Court was collective, might be heard by any Judge of the Supreme Court, and decided by him singly, when he should think it unnecessary to consult the Court collectively, and that this practice, not being in the opinion of the majority inconsistent with the construction of the Charter established by usage, should be adhered to for the time; reserving for the consideration of the Court the revision of its rules on the subject. The Chief Justice thereupon withdrew, the parties consenting to the case being tried before the two remaining Judges, who were to request the opinion and advice of the Chief Justice on any point which in their judgment might require his aid.—No. 84, D. C. *Manar.*

Feb. 20.

Vow of Poverty —does not excuse the performance of duties undertaken.

458.—The vow of poverty taken by a Buddhist Priest, according to the precepts of his religion, may be a reason for declining altogether to assume possession of property; but it can be none for refusing to fulfil all the obligations of a Legatee, if he accepts the legacy.—No. 21, B., D. C. *Amblangodde*, (J.)

Feb. 23.

Fine for vexatious appeal.

459.—The Supreme Court having affirmed a decree which had been appealed against on frivolous grounds, decreed that a fine of three shillings should be levied on the Appellant for vexatious litigation.—No. 13,315, D. C. *Colombo, S.* (J.)

Petition to defend *in forma pauperis.*

Evidence of a good *prima-facie* defence.

460.—Where a party who applied to be allowed to defend *in forma pauperis*, produced two deeds, one of which appeared very new, whilst the other was an old deed; *Held* that the fact of undoubted possession, coupled with the deeds, was in itself a good *prima facie* defence, and that if it were true that the defendant had been in undisturbed possession of the property in dispute for any length of time, say one year, he should be allowed to defend *in forma pauperis.*—No. 1277, D. C. *Wadimoratchy*, (J.)

Suit by the Government of Ceylon, cannot be entertained

461.—In a case from Ratnapoora, wherein *the Government of Ceylon* was plaintiff, and which had been tried by a Judge, who was also the

Acting Government Agent of Ratnapoora, the Supreme Court ordered "that as the District Judge had no jurisdiction, being also Acting Government Agent and the plaintiff therein, the case should be referred to the District Court of Caltura." —No. 1220, D. C. *Ratnapoora*, (J.)

by a Judge, who is also the Govt. Agent.

462.—The Court below having dismissed a claim as prescribed by the lapse of a year, the plaintiff appealed against the decree on the ground that the defendant had made a promise of payment within the year, though no allegation of such promise had been made previous to the petition of appeal. The Supreme Court however set aside the decree of the Court below and allowed the plaintiff an opportunity of proving such promise, on payment of all the costs previously incurred.—No. 2728, D. C. *Galle*, (J.)

A New Trial, granted, in order to allow a party to produce evidence against Prescription.

March 1, (J. St.)

463.—In an action for damages for the breach of an engagement for the purchase of the Pearl Fishery of Condatchy for the year 1829, it appeared that in December 1828 the plaintiffs had entered into an Agreement with certain parties in India, whom he stated to be the partners of the defendants, by which, in the event of his taking the rent of the pearl-fishery from Government, they bound themselves for a quarter of that rent, and agreed to deposit £4,700 in ready money, and that when the dhoneys for the quarter-share should be delivered to them they would give up the above deposit and pay the remaining price of the quarter-share as the instalments became due. This instrument further provided that if the plaintiff should engage as partner with others without purchasing the rent (in other words should become an under-purchaser from the contractor,) the defts. were to have a fourth of his share, whatever it might be; and that the £4,700 to be paid by them should first be applied to the payment of their share of the deposit, and next, together with the profits, to the payment of the remaining instalments; and further that, whether the plaintiff took the whole or the half of the rent (provided it was as contractor,) they would pay the

Action on an Agreement respecting the Pearl-Fishery.

£4,700; and that in case the plaintiff took a quarter or an eighth of the rent, the £4,700 were to be paid back. The parties in India, having signed this agreement (*exhibit* A.), gave the plaintiff, as "ready money," a draft in favor of the defendants, native merchants in Ceylon.

Having arrived in Colombo in January 1829, the plaintiff entered into an agreement (*exhibit* B,) with *Coomarasamy* and *Moottoosamy* that the tender to Government should be made by Moottoosamy, and that he should have two-eighths, Coomarasamy one-eighth, and the plaintiff the remaining three-eighths; and the rent was accordingly obtained on this tender for £45,100; of which £9,020 were to be deposited forthwith, and the remainder paid in instalments. The contract with Government being entered into by Moottoosamy and one *Akady Marcar*, who was known to all the parties as the mere agent of the plaintiff.

In the meantime the plaintiff had presented the draft for £4,700 to the defendants, who gave him in exchange, and on receiving from him a receipt in full for the draft, an ola document, in the form of a checque or letter of credit drawn on Moottoosamy at the fishery; which however Moottoosamy declined to honor when presented to him.

The fishery then proceeded, but in consequence of the dishonour of the draft, the plaintiff's share was reduced from five-eighths to one fourth; whereupon the plaintiff brought his action against the defendants, averring that they were partners with the parties to the agreement A., and that he had suffered special damages to the amount of the above mentioned difference. To this action the defendants pleaded that the agreement was not mutual, that they had received no consideration, that the plaintiff had not performed his part of the condition, and was neither actually nor potentially the owner of the article mentioned to be sold by him by the agreement; that the defendants had on their part complied with the stipulated conditions, having given a bill of exchange which had been duly accepted and paid; nor had any notice been given to the contrary, nor any protest made for non-acceptance or non-payment; that the plaintiff

had waived his agreement, and that no loss had accrued to him as no profits had arisen from the fishery.

The Supreme Court, after hearing evidence themselves, gave judgment as to the facts,—that the defendants and the parties to the agreement of December 1828 were partners,—that they were aware of the rent which the plaintiff was to receive under the agreement B,—that the India-draft for £4,700 had never been paid, having been only discharged by the partners at Colombo by means of a checque subsequently dishonored in their presence and at their request,—that there had been no waiver of the agreement on the part of the plaintiff,—and that damages did accrue to the plaintiff from such non-payment to the extent of £2,000.

Mutuality in an Agreement may be presumed, though the defendant has not signed it.

And as to the points of law, the Court pronounced judgment as follows:—"The objection as to the want of Mutuality arises from the circumstance of the plaintiff's signature not being attached to the agreement A., and from its being in language an obligation to him only, and not also one from him to the defendants. This however is a very ancient commercial practice well recognized not only in India but on the Continent of Europe. In mutual contracts, two parties, instead of entering into joint articles of agreement which they both sign, each receiving a copy, draw up and sign singly separate instruments, in which each sets forth the nature and condition of his obligation to the other. They then exchange these instruments, and thus each obligee becomes the holder of his obligor's acknowledgment or obligation. Or sometimes, now indeed more frequently, the instruments are counterparts of each other, though they each bear the signature but of one. Yet the mutuality equally exists in either case, and the circumstance of one party holding the other contracting party's signature establishes a *presumptio juris*, that that *other party has the counterpart* bearing his. They therefore bear the shape rather of English bonds with the conditions set forth by each obligor, on which they respectively stipulate that their obligation shall be binding or void.

Mutual consent —a sufficient consideration.

" As to the want of a consideration,—what is the nature of the contract? It is a contract of that class in which the mutual consent of the parties is sufficient to render the agreement obligatory on both,—in which, as in Articles of Partnership, it is a sufficient consideration that the party did and was willing to do all that he had undertaken to do, and that he has done nothing which could put this out of his power.

Objection that the plaintiff was not at the time the owner of the article contracted to be delivered.

" As to the objection that the plaintiff was not ' actually or potentially' the owner of the article mentioned, this as well as the further question, whether if it were so, this was not owing to the defendant's breach of promise, is determined in the plaintiff's favour by the evidence adduced in the case, that the defendants throughout the transaction well knew the portion which the plaintiff was to receive from the rent under the agreement B.

Damages—A Court cannot award more than is claimed, in the absence of a prayer for General Relief.

" Then as to the damages,—special damages are alone demanded by the plaintiff, no claim being made for damages generally; and though this Court would not tie down parties, on occasions of this kind, to the strict rules of European practice, and would be prepared to afford them every relief against mere formal irregularities; yet it cannot of itself consent to infringe settled principles by awarding *ultra petita*, there not being in the Libel or in the plaintiff's Petition of Appeal even a prayer for 'general relief.' The decree of the Court therefore is that the defendants do pay to the plaintiff Two thousand pounds sterling and costs; and that the counter-part of exhibit A. in the hands of the defendants, be cancelled."—No. 84, D. C. *Manar*, (J. St.)

Attachment against an Officer of the Court.

464.—An attachment against an Officer of the Court, though regular and admissible in cases of negligence or disobedience, should only be resorted to with caution. An application for an attachment is an appeal to the discretion of the Court, and though that discretion may be overruled by the Supreme Court, there must be strong grounds for doing so.—No. 3252, D. C. *Galle*, (J.)

Mar. 2.

465.—Where it appeared on an appeal (No. 2841) from the District Court of Negombo, that another suit (No. 12939) was pending before the District Court of Colombo, North, between the same parties (who were both resident in the District of Negombo,) and in respect of the same cause of action, and that neither of the cases had proceeded far; the Supreme Court by a decree, pronounced in No. 2,841, referred both the cases for decison to the District Court of Negombo, and directed a notification to that effect to be made to the District Court of Colombo, North.—No. 2841, D. C. *Negombo*, (J.) Transfer of a case commenced in a wrong Court.

466.—In an action to recover certain lands from the defendant, the defendant asserted his right to them under a deed of gift previously granted to him by the plaintiff's vendor. The Supreme Court, after reading the evidence, set aside the deed, and pronounced the following judgment:—"Though the deed in favor of the defendant is set aside, the Court can scarcely pronounce it a forgery; but it is convinced that on signing the deed, the donor's impression was that he was to be supported for life; and that he was not duly supported is sufficiently proved. But in withdrawing the land from the defendant, he is entitled to recover from the plaintiff all that he actually paid for the deceased; the profits of the land on the one side and the maintenance of the deceased whilst he resided at the defendant's, on the other, being compensated."—No. 23, D. C. *Matelle*, (J.) Cancellation of a Deed of Gift signed under a wrong impression. Failure of consideration. Compensation of Profits and Expenses.

467.—Where the evidence is clear as between the plaintiff and defendant, the Court cannot refuse to decide on the ownership to the property in dispute between them, merely because there is a third person who also claims it; for such a third person cannot be prejudiced by proceedings in a suit to which he is not a party.—No. 2323, D. C. *Matura*, (J.) Judgment as between a a plaintiff and defendant. Third parties.

468.—Where a party has taken no appeal against a decree, it becomes final and irreversible. —No. 1966, D. C. *Matura*, (J.) *Res Judicata*, in the absence of an Appeal.

Ministers of Religion, calumnious charges by.

469.—Though the Ministers of every Religion are upheld by Law in exercising a certain discipline and controul over their congregations, they are not the less amenable to justice, if, on pretence of such controul, they should wantonly indulge in calumnious charges or imputations.—No. 1086, D. C. *Matura,* (J.)

Mar. 15, (R. St.)

Order for the return of the proceedings, upon Petition for leave to appeal to the Privy Council.

470.—Petitions for leave to appeal to the King in Privy Council, under cl. 52 of the Charter, were presented in two cases; and it was thereupon ordered that the proceedings be returned to the Supreme Court, in order that the decrees in the said cases, together with the proceedings had in the Court below, might be brought by way of Review before all the Judges collectively at Colombo.—No. 1083 and No. 84, D. C. *Manar.*

April 19.

Injunction against a Sale—granted by the Supreme Court.

471.—*H. Staples,* Proctor, filed a Petition of D. F. WijesekereHaminey, stating "that her late husband had been for the past twenty years and upwards in the legal possession of a certain garden called *Dawettigaha-coeroendoewatte,* situated in the village *Lianegay-mulle* under the Raygampatte of the Aloetcoer Corle; and that the Agent of Government had advertised the said garden for sale on the pretext, as the petitioner believed, of its being a Cinnamon-garden, the property of Government." And two other parties severally appearing in person being sworn "that to the best of their knowledge the contents of the said Petition, which had been duly explained to them, were true;" Mr. *Staples* thereupon moved that "an injunction might issue to desist from selling the said land until the decision of any suit which the Government or its Agent might think proper to institute, directed to the Agent of Government for the Western Province and his Assistant or Assistants and all other persons acting under his or their authority," and it was ordered accordingly.—*Pet. of D. F. Wijesekere Haminey,* (R.)

April 22, (R. J. St.)

A Dist. Judge bound to record

472.—A District Judge is not entitled to refuse any evidence offered in his Court without record-

ing the refusal and its reasons. And where the Supreme Court on Circuit had decided a case in Appeal, and it subsequently appeared on a statement made by the District Judge, that evidence had been offered but had not been taken down by the District Judge, who thought it unnecessary, but made no entry to that effect in the record, the Judges sitting collectively at Colombo determined that under these circumstances, the Court considering the record imperfect, the judgment in appeal which had proceeded on that record was not to be held final on the question under litigation; and thereupon remitted the case to the District Court, with directions to take the evidence previously offered and to report accordingly so as to enable the Supreme Court to proceed to a review of the matter on a record properlyclosed.*—No. 2256, D. C. *Islands*, (Coll.)

reasons for rejection of evidence.

A judgment in appeal on an imperfect record, held not final.

473.—On an application by a plaintiff in respect of a former decree, the defendant by his Answer admitted the decree, and that he had not paid anything upon the same, having appealed against that decree, and no decision in Appeal having been made known to him. The decision being subsequently produced; *Held*, that the defendant, after a distinct admission that he had not paid the costs awarded, could not be allowed to plead Prescription, which in matters of *debt* was only founded on a presumptionof payment.—No. 1926. D. C. *Matura*, (J.)

Prescription, not pleadable after an admiseion of the debt.

474.—The rule 24 of sec. i. of the *Rules and Orders* should be taken in conjunction with rule 28, which provides as to cases where further evidence may be requisite. Where there had been an unaccountable contradiction between the two subscribing witnesses of the same bond; *Held* that it was a case in which the discretion allowed by that rule might be beneficially exercised.—No. 3536, D. C. *Putlam*, (J.)

Further evidence, under rule 24, sec. i.

April 26, (J. St.)

475.—By an Agreement executed in October 1825, *Christina Dias* (the first defendant) pro-

Agreements for transfer of land. Waiver.

* See *Circ. Min.* Northern Circ. 19. Jan. 1837.

mised that on the plaintiff marrying her daughter *Catherina*, he should receive in dowry, two months after the marrige, " one-third part of her house and garden in which she was then residing;" and that as the father of the plaintiff had undertaken to pay Rds. 400, being the value of the remaining two-thirds, she consented to the plaintiff's taking possession of the whole. The documents was signed by Christina Dias only, and there was no signature or document of the plaintiff's father.

Shortly afterwards, the plaintiff married Catherina.

In October 1828, the first defendant married off another of her daughters, *Magdelena*, to *Casper Casy Chetty* (the Intervenient;) and on that occasion by an agreement entered into between the mother, the daughter, and the intended husband, it was covenanted that the mother should give this daughter one-third of the same house and garden or the value thereof Rds. 200, and which house and garden were stated to be the property of the defendant.

In April 1833, she married off a third daughter to the second defendant, and similarly promised him " a third of the garden belonging to her equally with her two other daughters; and further, that after her death, the second defendant should receive a third of the house also, and that until such time, he should have the right of dwelling therein."

Notwithstanding the two last engagements, the first defendant in July 1834 transferred the whole house to the plaintiff in furtherance of the Agreement of October 1825; and in October 1834, the plaintiff brought his action against the mother and the husband of the third daughter to eject the latter from the house, or for the recovery of damages as against both of them; and to this suit *Casper Casy Chetty*, the husband of the second daughter, was made an Intervenient.

The Court below, after hearing evidence, authorised the ejectment, and confirmed the plaintiff in the possession of the house. But on appeal, the Supreme Court held that it was clear from

the agreements themselves, (the two latter being admitted to have been entered into with the plaintiff's knowledge,) that the parties never considered the first agreement of 1825 (in favor of the plaintiff) as a complete and final transfer; and *per* JEREMIE J.,—" If further evidence were required, it would be found in the evidence of the plaintiff himself, who admits that about three years ago, he, at the request of his mother-in-law, got a Surveyor to divide the garden into three parts, on which occasion it was not determined which share should go to either party; and that a second Surveyor was afterwards called at the request of the second defendant, to rectify the line drawn by the first; and that two months after the intervenient's marriage, he demanded from the plaintiff Rds. 200 as his share of the value of the house and garden, but receiving only Rds. 150, returned it saying that he would not accept a part; which shows not only that the house and garden were not then paid for, but that the plaintiff refused to avail himself of the alternative in his favour in the intervenient's marriage-contract. It is also established that immediately after the marriage of the second defendant and the intervenient, they each took possession of a portion of the estate. Under these circumstances the Court cannot but consider that the plaintiff has entirely waived his right of preemption, first by his own acts, which are inconsistent with his present claim to the proprietorship, and secondly by lapse of time alone; for without affixing a positive limit, which must depend much upon circumstances, to the period within which a party may claim the specific performance of a prospective stipulation, *nine* years' forbearance must under nearly any circumstances be considered in itself as amounting to an abandonment. Nor can the temporary possession and other points alleged by the plaintiff to shew a *de facto* transfer with retention of possession (all which may be explained in various ways consistently with the rights of the parties,) weigh against the conclusions necessarily drawn from the plaintiff's own proceedings, which are directly

Claim of specific performance, when prescribed.

Possession of the property agreed to be transferred.

in contradiction to his pretensions as sole proprietor. A distinction may indeed be drawn between the case of the second defendant and that of the intervenient, owing to the alternative as to the money or the one-third of the house, which is inserted in the latter's marriage-contract; but the intervenient having met with a refusal so far back as 1828, and having since taken possession of a share of the house, the alternative is to be presumed to have been resolved, with the full consent of the parties, in favor of the possession." The decree of the Court below was therefore reversed, and it was decreed that the stipulations in the marriage contracts of the several parties respectively should, as far as related to their one-third share each, continue to have full effect; the plaintiff paying the second defendant's and intervenient's costs, and the 1st defendant bearing her own.—No. 4919, D. C. *Colombo, N.* (J.)*

Services—Royal Village.

476.—In an action in respect of certain services which the plaintiff claimed from the defendants, it appeared that the defendants had, for many generations past, been holders of certain lands in the Royal village of *Pattepamene*, on the express condition that they should give half of their monthly service to the Crown; and that the Crown had transferred its rights to the plaintiff by grant. (Services on account of tenure in Royal villages were expressly reserved by the Order in Council of the 12th April 1832.) Service during the half of each and every month was therefore due to the plaintiff, as anciently to the Crown, (being in fact the price of the land); but in order to entitle the plaintiff to recover the arrears of services, *Held* that proper notice to perform service should have been proved; for if the grantee, even under a misapprehension, had thought fit to waive the *personal duty*, he could not subsequently convert it into a money-payment. Under these circumstances, the Supreme Court decreed the defendants to be liable to perform service to the

Demand of Service before action.

* The decision, although marked J. in the Minutes (as having been pronounced by Mr. Justice *Jeremie*,) contains also a note in pencil to the effect that it was a *collective* decision.

plaintiff for 15 days in each month, and to indemnify him for the non-performance of past service at the rate of three fanams a day, to be computed from the commencement of the suit. [It had been stated in the course of the proceedings that the defendants were further liable to perform "*extra* service when required;" but *held* that this could not be admitted, as such extra service had been clearly abolished by the above mentioned Order in Council.] No. 4053, D. C. *Four Corles,* (J.)

Custom of Ratnapoora in respect of *Nille*-tenure.

477.—A case having been referred back to the District Court of Ratnapoora, with directions* to ascertain the accustomed usage in respect of the *nille*-tenure, viz. 1, as to the accustomed period at which the incoming tenants take actual possession, whether before or after the harvest of the year; and 2, if before, whether it is the invariable usage for this incoming tenant to take the proprietor's share of the crop on the ground;—the Assessors, a large majority of the witnesses in the case, and the District Judge were all agreed "that it was not the the usage for the incoming tenant to take the crop on the ground; and that as regards the particular *nille*-holdings in question, it was established that in the village over which the defendant had controul, the custom was to enter in June, the land being then fallow;" and the case was decided by the Supreme Court accordingly. —No. 794, D. C. *Ratnapoora,* (J.)

Incoming tenant not entitled to the crop on the ground.

Time of Entry.

Interest—not claimed in the pleadings.

478.—Where no interest was claimed in the pleadings, the Supreme Court refused to award any.—*Ibid.*

May 3, (R. J. St.)

Defence *in forma pauperis,* allowed in spite of a Proctor's certificate.

479.—On an appeal against an Interlocutory order rejecting certain documents tendered on behalf of the defendants without stamp, it appeared that an application of the defendants to be allowed to defend *in forma pauperis* had been previously refused on the report of a Proctor that the defendants had not a good defence,—an opinion reiterated on a second reference subsequently made to the same Proctor. An affidavit of want

* 1. February, 1837.

of property in the defendants had however been sworn to and admitted upon the proceedings; and *per* ROUGH J,—" If credit be given to such affidavit, it is better that the case should be heard out. There is a great difference between the position of a defendant and a plaintiff in cases of this description; and there seems ambiguity enough in this transaction to admit of its being heard through. Without prejudice therefore to the case of the plaintiff, it is directed that the interlocutory order be overruled, and that the defendants be allowed to file their documents as paupers, subject to the final decree of the District Court treating the case as a whole."—No. 1149, D. C. *Wadimoratchy*, (R.).

Court may rescind a preparatory order.

480.—A Court is at all times at liberty to rescind an order purely prepatatory, before it proceeds to the merits.—No. 292, D. C. *Tangalle*, (J.).

Plaintiff not entitled to object to a particular construction of the Answer.

481.—A District Court having itself explained the meaning to be put upon the Answer of a defendant, and that view not having been disputed by the defendant himself, who under the circumstances could alone complain if a wrong construction had been put upon his word, *Held* that the judgment of the Court could not be considered open to objection on the part of the plaintiff.—*Ibid.*

Registrar's fee for reporting on a Bill of Costs.

482.—Where a Bill of Costs had been referred* to the Registrar of the Supreme Court to be entirely retaxed, with liberty to the proctors for both parties to appear before him and state their objections, it was considered and adjudged (the report of the Registrar having been adopted,) that an additional charge should be allowed for the Registrar's special report, equal in amount to the fee formerly allowed to the Master.—No. 2612, D. C., *Negombo*, (J.)

Breach of Contract—Principal and Agent.

483.—In an action for damages on a breach of contract, it appeared in evidence that on the 22. Jan. 1836, the plaintiff received from the first de-

* 26. *April*, 1837.

fendant (a merchant trading in Colombo,) the following note, referring evidently to some previous communication which had been referred by the first defendant as Agent, to the second defendant as Master of a ship then in the harbour,—"My dear Sir, If you will tell me the exact number of bags of Coffee and bales of Cinnamon, I will book you for freight *per Tigris* at current rates. Your's truly, *R. Jeffery*;" to which the plaintiff replied as follows,—"My dear Sir, With your leave I consider Coffee *per Tigris* 1300 bags, Cinnamon in bales and boxes 16 tons, *settled.* Your's truly, *C. E. Layard*;" and on the same day the correspondence was closed for the time by the following note from the first defendant,—"My dear Sir, I have booked your Coffee and Cinnamon *per Tigris.* Yours truly, R. Jeffery."

The *Tigris* having however, notwithstanding the above undertaking, shipped only 220 bags of Coffee and none of the Cinnamon, the plaintiff brought his action for damages sustained by him by reason of the breach of contract. The defendants pleaded severally,—the *first* that he had merely acted as the agent of the second, and was not therefore responsible for his acts; and the *second*, that there had been no contract; that if it had originally existed, it had been waived by the plaintiff; and lastly that the plaintiff had suffered no loss.

And as regards the first defendant, *Held* that he was not personally liable. "An agent acting within the scope of his instructions and contracting as such for a known and responsible employer, especially if he was present (and the second defendant was proved to have been present and to have been consulted with repeatedly throughout the transaction,) incurs no personal liability to a third party; for when such third party 'knows him to be an agent, knows his principal, and knows that he intended only to bind that principal, he will be taken to have trusted to the credit of the principal only, except in the case of Masters of ships,' who in most occurrences bind themselves as well as the ship." Agent not personally liable.

As to the second defendant, much stress had

Custom of Merchants—

been laid on the custom of this port with regard to *booking*, and evidence adduced to shew the construction which had by usage been put upon the practice of booking: and an argument had been raised as to the power of the agent of a ship to bind the Master by *booking* for freight. The judgment of the Supreme Court hereon was as follows:—"The Custom of Merchants, which is respected as law, and, in default of express enactment, is taken as such, is not the mere local and peculiar practice of any given port, but the generally recognized practice and usage among the merchants of the Nation to which that port is subject; and the custom of this port or any other port is therefore entitled to be upheld inasmuch only as it is reasonable in itself and not inconsistent with the generally recognized practice of British Merchants, and no further. In the present case, it would seem that a distinction may, for practical purposes, be drawn, and has existed at Colombo, between the mere *booking* for freight with the Agent, before the arrival of the vessel, and a subsequent *booking* when the Master is present in port. The former would appear to be contingent and subject to subsequent ratification of the Master; so that, if on his arrival he should happen to be pre-engaged for a whole or a part of his cargo, or if he should wish to retain the whole of his ship or any part of the tonnage for his own use, be is not so bound down by the act of his Agent here as to preclude his making his election, provided he acts in perfect good faith and makes known his resolution in reasonable time. The conditions implied by such a booking will appear to have been fulfilled if, as regards the quantity and quality of merchandize to be shipped at the port under engagements formed there, the goods are taken in the order in which they are booked by the Agent; the booking in such a case amounting to nothing more than the securing a preference for the unengaged space in the ship at the time of her arrival, whatever that space may be. And this implied condition being not unreasonable, if it be the common understanding of the Merchants that

Booking for Freight. Liability of Master thereon.

such is the generally recognized practice, and that effectually to bind the ship it is under these circumstances requisite to have a special agreement with the Agent, it is probable the Court would feel a reluctance to disturb it. But where the Master is present, where though the correspondence be principally carried on with the Agent, still it is done with the Master's assent and concurrence, when a word from him could stop the whole transaction; then very different is the construction to be put upon the booking. In that case it cannot but be construed as a term of distinct acceptance, from which neither party can recede, except at the risk of an action for a breach of covenant." And it was *held* that the transaction between the parties was a complete contract for freight, which the second defendant was bound to fulfil, unless some unforeseen occurrence attributable to neither party should intervene to render its execution impracticable; but that any engagement to sanction the infringement of such a contract, owing to a subsequent view of the Owner's or the Shipper's interests, would run counter not only to all the known rules of trade, but to the ordinary principles of good faith; and that even if the most perfect unanimity should have prevailed in the trade in regard to such a practice, this would not alter the opinion of the Court, which would on the contrary be bound to extirpate so defective a practice.

Alleged waiver of the Contract.

The *waiver* insisted upon by the second defendant arose from the following note from him to the plaintiff written on the 2. February,—"My dear Sir, As soon as the ship is ready for taking in, I will send you an order to ship. I shall not be able to take the whole of your Coffee. I think you had better send some on board the *Colombo*. Your's truly, *J. Stevens*,"—and from the circumstance that from that day to the 27. February, the plaintiff had not required an explanation of that note, but seemed satisfied with the exclusion of a portion of his freight. On this point the Court pronounced judgment as follows:—"There can be no doubt that under ordinary circumstances, there might be some reason to infer a willingness to abandon from a silence of upwards of three

weeks respecting the lading of a ship, especially if this fact were coupled with others to the same point : but here, setting aside the extreme vagueness of the note itself as to the quantity which might yet be shipped, its effect, were its terms much more distinct than they are, would probably be quite neutralised by any of the three following circumstances; and it certainly is so, taking them all in conjunction :—1, that subsequently to the transmission of this note, a further order was actually *booked* for this ship; 2, that to make up a cargo a larger quantity than the plaintiff's of the same kind of merchandize, was shipped for local merchants, who had never booked; and that of 5119 bags actually shipped, 3396 were for account of the ship-owner and the Agent themselves. Now even a clearer consent to waive your right rather than inconvenience your obligee, can scarce be construed into a consent to give him and others a direct advantage over you, in defiance of his agreement with you.

Damages—Interest on intended shipment.

"And as to the *damages*;—the damages are stated generally; and the breach of contract being proved, damages are due. It is true, the heaviest item in the estimate of damages is not made out, viz. the loss on the sales, owing to the delay. It is shewn however that there was an increase of £1 *per* ton in the freight; and interest is certainly due on the intended shipment during the time it was necessarily delayed.

The decree of the Court below (which dismissed the plaintiff's claim as against both defendants,) was therefore, with the concurrence of the Assessors,* affirmed as to the first defendant personally, and reversed as to the second defendant, who was adjudged to pay the plaintiff £100 damages and costs as against him. And it being admitted that subsequently to the transaction, the first defendant had stood security for the second, and being as such necessarily bound to discharge to the extent of his bail any condemnation incurred in the cause, he the first defendant was held to continue res-

Agent standing security for his Principal.

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* Being three Mercantile gentlemen of this port, viz. *J. E. Young*, *E. Darley* and *A. Fraser*, Esquires.

ponsible to the plaintiff for the amount decreed against the second defendant.—No. 11440, D. C. *Colombo, S.* (J.)

May 6, (R. J. St.)

Grounds for striking off a case should be specified.

483.—On a case being summarily struck off, the grounds of the proceeding and the rule under which it is adopted should be specified.—No 3855, D. C. *Jaffna,* (J.)

Adoption—under the Kandian Law and the Dutch Law.

484.—Though in the Kandian Provinces, on failure of children by birth, an Adoption entitles the adopted child to the succession of the parents by adoption, to the exclusion of collaterals, it is otherwise in the Maritime Provinces which are governed by the Law of Holland.—No 240, D. C. *Tangalle,* (J.)

Gift of more than Donor was entitled to.

485.—Where a deed of gift conferred on the donee the whole of an estate, of which the donor had but a share, *Held* that the deed, so far as regarded the portion of which the donor was the undoubted proprietor, was a good gift. Had he given less than he possessed, his heirs would have had the overplus. He had given more; the heirs were shut out; and the deed was reduced to its true amount.—No 1026, D. C. *Ratnapoora,* (J.)

Verbal Bequest of Lands—

486.—Where a party had transferred certain lands to his adopted children (plaintiffs,) by a verbal bequest, which he had endeavoured to get reduced into writing, but died before it could be executed; *Held* that he had a right by Kandian Law and Custom to make such a grant; but there being no writing to that effect, no action could be maintained thereon. (See Procl. of October 1820.) A distinction was however drawn between maintaining an action and defending it, and though the plaintiffs were held not entitled to claim possession of the lands under such a bequest, yet, if the other heirs (defendants) who might have disputed the grant had actually acquiesced in it and granted possession; then, the equity of the case being exactly the same whether the grant had been verbal or written, having once fulfilled their common ancestor and donor's pleasure, they were too late to recede from

Heirs when estopped from disputing.

it. And the plaintiffs who had been proved to have been in possession of one of the lands for eight years, were held entitled to retain it notwithstanding its being included in a previous deed of gift to one of the defendants.—*Ibid.*

Submission void by death of one of the Arbitrators.

487.—A submission to arbitration becomes void by the death of one of the Arbitrators; and an Award not signed by all the Arbitrators is also void.—No. 732, D. C. *Chavagacherry*, (J.)

May 17, (R. J. St.)

Dissolution of Partnership—Payment to one of the Partners.

488.—In an action for money, the defendant pleaded that the plaintiff had been in partnership with another, and that he had paid the debt to such partner; but in his examination, he admitted that he knew at the time he paid the money that the partnership had been dissolved. This admission was however *held* insufficient to justify a judgment against him. He must have been proved to have known that the plaintiff was the liquidating partner; for until then, he was fully justified in paying to either partner. The judgment was therefore set aside and the defendant allowed to prove that he had discharged the debt by means of a bond or therwise to *either partner.*—No. 4,788, D. C. *Uttuan Kandy*, (J.)

Conspiracy.

489.—That two parties having the same pretensions should unite to recover their due, is neither unusual nor improper, when they both appear and their grounds of action are much the same; but that two parties having directly opposite pretensions, so that their claims could not stand together, should combine against a third, the one suppressing his own pretensions but stipulating for a share in the spoil, is in itself suspicious and culpable to a degree; and if the person so suppressing his claims should be brought forward by his confederate as a disinterested witness in the case, so gross and scandalous a fraud should, on its detection, be instantly punished as a contempt of Court of the blackest dye, to say nothing of informations for Conspiracy and Perjury.—No. 801, D. C. *Uttuan Kandy*, (J.)

A party suppressing his own claim to assist another's.

Contempt of Court.

490.—By the Charter, all those rights devolved to a District Court which are usually possessed in England by Courts of Law and Courts of Equity: and none is better established in equity than the practice in cases of palpable fraud of awarding damages under the name of increased costs.—*Ibid.*

Rights of District Courts.

Increased costs.

May 20.

491.—There being a *prima-facie* case of the removal of some property from the plaintiff's house by the defendants; *Held* that in default of proof to the contrary, the property must be presumed to have belonged to the plaintiff.—No. 4,459, D. C. *Uttuan Kandy*, (J.)

Possession—*prima-facie* proof of ownership.

492.—A mere application to Government for land does not constitute a right to the ground, unless accompanied by after-possession; but it raises a strong presumption of possession; and although the Government could resume, yet as between party and party it requires but very little more to establish the fact of possesion; and, setting aside parole evidence, that *little more* was held to be fully supplied by two receipts from the renters for the Government-share of the crops of two years; for it could scarcely be presumed that a party would have paid the Government its rent, had he no share in the produce.—*Ibid.*

Application for and possession of Government Land.

493.—The strictest rules of Practice bend to a necessity, if convincingly proved.—No. 893, D. C. *Amblangodde*, (J.)

Rules of Practice—Necessity.

May 24, (R. J. St.)

494.—In an action for money due by the defendant to the plaintiff as the balance of their mutual accounts, the plaintiff appealed on the ground that the Court below had rejected certain evidence tendered by him to prove his right to two-fifths of the profits accruing from the sale of a quantity of goods purchased by him at Colombo and retailed by the defendant at Kandy. The ground of rejection was that parol evidence of a partnership was inadmissable, and that the plaintiff was to be presumed to have acted as the defendant's agent on the occasion; but *Held* by the

Parole evidence of Partnership.

Supreme Court that although evidence of a general commercial partnership was inadmissible under the Ordinance No. 7 of 1834, if the capital exceeded £100; yet this could not be construed to extend to mere joint speculations which are daily entered into by mercantile firms in other respects, perfectly independant of each other; nor if the plaintiff had acted as the defendant's agent, would there have been any thing unusual or irregular in his having stipulated for a share in the profits in lieu of commission.—No. 7331, D. C. *Kandy*, (J.)

Stipulation by an Agent for a share in the profits.

Notes of Hand—how far conclusive as proof of the debt.

495.—In the above case, the defendant having claimed in reconvention the amount of two Notes of Hand from the plaintiff, the plaintiff had alleged that these notes though still in the hands of the defendant had been fully satisfied; and on this point also evidence had been rejected: but *Held* that although a negotiable bill in the hands of a third *bona-fide* holder would prove itself so effectually that evidence either as to the want of a sufficient consideration originally or as to the subsequent discharge by payment would be inadmissible; yet the rule did not apply to the notes in question; as they were not negotiable, and if they were, the obligor and obligee were themselves the parties in the case; and though the fact of the notes being in the hands of the latter was *prima facie* evidence that they were unsatisfied, it was not conclusive proof, and the inference might be rebutted by counter evidence.—*Ibid.*

Goods sold, and Money lent—what evidence necessary to support an action for.

496.—Two other points were raised in the above case with reference to a sum of money claimed by the defendant in reconvention " for cash lent and goods supplied by the defendant to the plaintiff without receipts or orders," and which the Court below had allowed to remain to the defendant's credit, on the testimony derived from his books and his own declarations; and hereon the Supreme Court pronounced judgment as follows :—" The Court would draw a distinction between goods supplied in the regular course of trade and money lent. For as relates to the *goods*, though even here the Court would by no means lay it down as a general proposition that a tradesman's books are to be

Tradesman's Books.

considered sufficient evidence of his dealings, yet looking to the peculiar circumstances of the case, —considering that the goods in the item, of small amount and in daily demand, were supplied prior to the month of May 1832, and that the parties continued to deal together for upwards of two years afterwards, coupling that fact with the plaintiff's admission as to the loose manner in which they both carried on their affairs—it feels inclined to concur with the Court below in holding the item as to the goods sold as sufficiently proved. But as regards the *money lent*, this is a matter quite foreign to the defendant's trade, and it must be proved in the usual way. The entries in his book can only be taken as private memoranda for his own use; but of course any entry in the Accounts signed and produced by the plaintiff for any part of this money will be the best and most effectual proof against him for the amount so entered."—*Ibid.*

Security—on appeal to the Privy Council.

497.—*J. Staples,* Advocate for the defendants and appellants to the King in Privy Council, tendered two persons as securities for the due prosecution of the appeal and moved that the Court would fix the amount for which the said sureties were to bind themselves. *Perring* Advocate and *C. Morgan* Proctor for the respondents agreeing to the said securities, it was ordered that they should be accepted and the usual Bond executed before the Deputy Registrar of the Court for the sum of £200.

Appraisement of property tendered as security.

Perring for the Respondents subsequently moved that certain landed property belonging to the respondents and intended to be offered in mortgage to enable them to sue out execution upon the decree of the Court of the 1. March 1837, should be appraised under order of the Court. And the Court therefore directed that a schedule of the property tendered should be filed in the Registry of the Court, and recommended the parties to agree as to its value and generally as to the sufficiency of the security to be given.—No. 84, D. C. *Manar*, (J.)

Costs—on Modification of a Decree.

498.—Where a decree of the Supreme Court was neither an affirmation nor a reversal, but merely a modification of the decree appealed from, and no costs were mentioned therein, *Held* that no costs were due on either side.—No. 23, D. C. *Amblangodde*, (J.)

Reference to Arbitration—Ambiguity in.

499.—Where an Order of Reference to Arbitration made in a case was ambiguous, it was referred back for the purpose of ascertaining from the Court below, its intention on the occasion of naming the "arbitrators;" viz. whether it had been done for the purpose of ascertaining *an opinion* from persons conversant in those matters, for the information of the Court,—the Court reserving to itself a right of revisal and final determination, as was not unusual; or for the purpose of *adjudication*, on the condition that their award should be definitive and binding on both parties, the Court thus divesting itself of the right of revision, as was also frequently done: and if the latter were the case, whether the Court was satisfied that this had been clearly understood by both parties.—No. 2228, D. C. *Caltura*, (J.)

May 31. (R. J. St.)

Costs against a party, who has been dropped in the course of the proceedings.

500.—In a case where a party intervenient had been condemned in costs, it was *held* by the Supreme Court in appeal, that the intervenient might have been liable in the whole costs, had he been maintained throughout as a party in the cause; but he appeared by some oversight to have been dropped in the course of the proceedings and on the occasion of two previous appeals to the Supreme Court; and he could therefore be only rendered liable for the costs incurred in his presence and when he had had notice to attend.—No. 2225, D. C. *Jaffna*, (J.)

June 7, (R. J. St.)

301.—*Ebell* and others v. *F. A. Toussaint* and others.

Principal and Agent. Special Power to "recover."

Heirs of Wife how far responsible to Creditors of Husband.

John Verwyck, by his will dated the 10th August 1826, appointed *Martensz, Corteling, Keegel*, and *J. F. Toussaint*, his executors. Of these *Martensz, Corteling*, and *Toussaint* assumed the office in June 1829, and continued to administer until April 1836, when they were dismissed by the Court for malversation; and their property was seized and their person arrested, for the amount of the defalcation,—the plaintiffs being substituted as executors in their place.

Martensz was also the agent or attorney to the estate of *Johanna Elizabeth Mooyaart*, the first wife of one *M. P. Racket*, and a surety for the management of her estate. The wife died in 1813, and her husband about the year 1823 proceeded to *Batavia* and died there. In this second capacity, *Martensz* had similarly failed in his duty; and actions were entered against him by the present defendants as special attorneys of the heirs of *J. E. Mooyaart*, for the purpose of recovering certain monies and effects belonging to that estate; which actions were still pending.

In the meantime, the plaintiffs, as substituted executors of *Verwyck*, commenced the present action against the defendants, not as attorneys to the heirs of *J. E. Mooyaart*, but as attorneys to, or rather as generally responsible for, the heirs of her husband *Racket*, for the amount of two bonds granted by him to *Verwyck* in 1819 and 1823, and both therefore subsequent to the demise of *J. E. Mooyaart*. The defendants alleged, 1. collusion between *Martensz* and the defendants; 2. that the defendants' powers were general, or at least that they had undertaken to act generally; 3. that the heirs of the wife being also heirs of the husband, their attorneys were bound to meet this action for the debts of the husband; and 4. that if the action were not maintainable, then they were entitled to the ancient remedy by Edictile Citation against the heirs of the husband. To this the defendants repli-

ed that they were only special attorneys for the exclusive purpose of obtaining a settlement of *Mooyaart's* estate; that they were only empowered "to recover what they could get;" and even supposing any claims were brought against the children themselves, they could not meet them, much less answer to claims brought against the husband. The Court below held that the action was not maintainable, and dismissed the plaintiffs' claim Against this decree the plaintiffs took the present Appeal.

The Supreme Court, in affirming the decree of the Court below, gave judgment as follows:

"As to the *first* point, it appears that suspicion attaches at the utmost to the conduct of the *attorneys*, and that here the interests of the *principals* are chiefly to be considered; with regard to which it is not unreasonable to infer that if *Martensz* has proved himself undeserving the confidence of *Verwyck*, he would not have been much more scrupulous with regard to Mr. or Mrs. *Racket*.

"As to the *second* point, not only is the Power of Attorney special in its terms, but it does not appear that the defendants have ever overstepped their authority, every act alleged in this respect having been done (right or wrong) in the interest of the heirs of Mrs. *J. E. Mooyaart*. It is also clear that the debt for which they are sued is in no way connected with the estate of Mrs. *Racket*. But when the defendants go further and assert that if it were, they would not be liable to answer it, because they are only authorized to *recover*, they carry the principle too far. They are authorized to recover the estate or the inheritance, which includes the debts as well as the credits; and therefore when claiming the assets, they are bound to meet every claim against such estate. The estate coming to the heirs is in fact nothing more than the *bonus* after payment of the debts.

"As to the *third* point, there can be no doubt that if the defendants' constituents be also the heirs of *M. P. Racket*, they are responsible for his debts, and so is all their property however originally acquired, a *confusio bonorum* having arisen

as regards them from the time they assumed the responsibility of heirs to their father. But whether they have assumed this responsibility or not, is a point that must be settled by a separate action directed against them.

And whether, *fourthly*, the remedy in such action should be by Edictile Citation or by Sequestration under *rule* 15 sec. I of the *Rules and Orders*, is a point which cannot now be resolved by the Court, although it appears tolerably clear; but the real parties are not before it. The Appellants must therefore seek out their remedy." No. 4,000, D. C. *Jaffna*, (J.)

502.—*Peria Carpen Chetty* v. *A. Wirappen*.

In this case, the judgment pronounced by the Supreme Court (on an appeal by the defendant) is as follows:

The admission of a Party should be taken entire.

" Nothing appears in this case to prove the debt of Rds. 21 but the defendant's own admission (for the plaintiff's witnesses only prove for Rds. 6.) But this admission should be taken *entire* and not *severed*. He admits he *borrowed*, but in the same breath declares he *paid*. This circumstance, coupled with the evidence regarding the payment of the £1, would induce the Court to consider that payment as proved, and to reduce the judgment to 11s 6d, without costs."—No. 3,648, D. C. *Putlam* (J.)

503.—In the estate of *P. Enno Hamy*.

M. P. Don Andries, Administrator—Appellant.

Neglect of Administrator, how far excused.

No doubt great vigilance should be exercised over Administrators, and therefore the proceedings of the Secretary are perfectly regular. But considering all the circumstances of this case, that ample time has been afforded to other parties to claim this estate, that it does not appear that there are any creditors, and that the Administrator has for a length of time been seriously ill, he is

allowed to continue in the possession of the estate, of which he may be considered rather in the light of an undisputed proprietor than a mere administrator.—No. 4, D. C. *Amblangodde*, (J.)

June 21 (R. J. St.)

504.—In the estate of *Supermanian Perianbelam.*

S. Sinnetamby v. *Omeatte.*

Proof of Marriage. Legitimation by subsequent Marriage.

By a former decree of the Supreme Court proof was required of the Opponent (*Omeatte's*) marriage with the deceased; and that there was a son by that marriage born to the deceased. The proof of the marriage was subsequently supplied by the Registry, produced by the *Wanniah*. As regards the son, a certificate of his baptism was produced, mentioning the name of the parents. And the Supreme Court *held* that this, coupled with the Marriage Registry, was all that need have been produced by the Opponent; as it was clear law that a subsequent marriage renders the issue legitimate.—No. 3,835, D. C. *Trincomalie*, (J.)

505.—*Sedopaddy* v. *Beckkenhoff.*

Contempt of Court—Indecorous observations on a District Court.

The defendant in this case, a Notary practising within the District of *Wadimoratchy*, had addressed a letter to the Supreme Court complaining of having been wrongly summoned; to which he received a reply informing him that the Supreme Court could not interfere in the matter; and that the proper course for him to pursue was to put in his plea to that effect, and if that be over-ruled, to appeal against the order.

Instead however of appearing before the District Court, he filed a Petition against an order obtained by default, and in that petition made indecorous observations on the proceedings of the District Court.

Such a proceeding the Supreme Court thought

it to be its duty to mark with severe reprehension. The Petition was therefore dismissed as irregular; and the Petitioner fined Twenty shillings for contempt of the District Court. No. 1,457. D. C. *Wadimoratchy* (J.)

June 24, (R. J. St.)

506.—In the matter of *Don Vincenti.*

Application for a Mandamus to compel a D.J. to accept security.

The King's Advocate tendered an affidavit of *Don Vincenti*, stating that on the 12th Instant, a Medical Sub-Assistant, Mr. *John Loftus*, had after examination certified a son of the deponent's to be affected with Small-Pox; and that on the 14th inst. the deponent had applied to *D. A. Blair* Esq., the Judge of the District Court of Colombo, No. 1 South, to allow him to enter into the usual Bond, conformably to the Governor's Instructions of the 14th March 1837, and that the said Judge, refused such application; and he thereupon moved for a Mandate, in the nature of a Mandamus, to the said Judge, requiring him to allow the said *Don Vincenti* to enter into the usual Bond. And the Supreme Court granted a rule requiring the said Judge to shew cause why such mandate should not issue.

On a subsequent date,

June 26, (R. J. St.)

No cause being shown, the Rule was made absolute, and a mandate in the nature of a writ of Mandamus was issued to the said *D. A. Blair*, D. J. as aforesaid, commanding him as required by the said Instructions to take the Bond of the said *Don Vincenti* in conformity with the application made by him, or that he do shew cause to the contrary on Wednesday next.

June 28, (R. J. St.)

On this day, upon the production of the Instructions of the 14th March 1837 from H. E. the

Governor to the D. J., and on a comparison of the same with the writ of Mandamus issued, it appeared that they were not in coherence with each other, and scarcely sufficiently imperative on Mr. *Blair* for the Supreme Court to grant the Mandamus prayed for, to enforce his compliance therewith. The said writ was therefore discharged.

June 29, (J.)

507.—*Pulleyen Welen* v. *Parpady Wally.*

Authority to act as *Curator ad litem.*

This case had been on a former occasion referred back to the Court below to ascertain whether the present plaintiff (who had been the 2nd plaintiff in a previous suit No. 5,859, in which the 1st plaintiff sued on his behalf,) was really a minor at the time, and if so, what authority the joint plaintiff in the former suit possessed to represent him. No such authority was however produced ; and the case having been returned to the Supreme Court, *Jeremie* J. now pronounced judgment as follows :

Transfer of a cause, on the ground of improper proceedings of a D. J.

" It is clear that the plaintiff's relative, then called *Uncle*, now *Cousin*, had not any authority to proceed in the minor's name.

" As to the mode adopted by the District Judge for setting aside his predecessor's solemn record, by calling as a witness to prove the plaintiff to have been twenty-two years of age, the very person who on the face of his original Libel had admitted that his co-plaintiff required some one to represent him, and then drawing vague surmises from depositions in the cause to which the present plaintiff, as a minor, was not legally a party,—thus making him, according to some part of the evidence, about thirty, when he had been pronounced, on view by the former Judge in No. 5,859 to be "under fourteen ;" it is so unexampled, that, coupled with the circumstance of that Court having repeatedly expressed an unusually vehement and erroneous opinion on this and its connected cases, the Supreme Court feels bound, without in any way questioning the purity of motive or integrity

of purpose of the District Judge, to exercise the powers confided to it by Sec. 36 of the Charter.

"The decree of the Court below, which was in favour of the defendant, was therefore set aside, and the case ordered to be heard *de novo*, without any reference to the former suit No. 5,859 : and it was also decreed that the further proceedings should take place before the D.C. of *Wadimoratchy*. No. 1,806, D.C. *Tenmoratchy*, (J.)

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508 —*Edenaduregey* v. *Rangoddegey* & others.

Joint-owners of Land.

Mode of ascertaining shares.

The plaintiff, as wife of one *Abere*, claimed half of certain lands which had been possessed by the common ancestors of her husband and the defendants. At the trial of the case, her marriage with *Abere* was satisfactorily proved, under the Regulation of the 9th of August 1822 ; and the question in appeal was, what share of the property in dispute belonged to *Abere*.

Jeremie J.—The three defendants are proved to be descended from the sister of *Abere's* mother. *Abere* does not appear to have had any brothers or sisters—at least none are present to disturb his claim. He is therefore at present to be presumed to have had none ; and as each of the defendants enjoyed a sixth, *Abere's* Aunt must have obtained a half of the joint inheritance. The other half is therefore the share belonging to plaintiff. As to the circumstance that the precise portions belonging to *Abere* are stated with uncertainty by the witnesses, it is at all times difficult, when property is so greatly subdivided, to ascertain the exact shares by oral testimony of possession ; and here it is the more difficult, that tho' the plaintiff claims half the property possessed by her husband and the defendant's common ancestor, she does not claim the half of any *particular field*. She claims half a corney from one field, a corney and a half from another, evidently admitting that there are other proprietors of each piece of land, over whose share she pretends to have no claim, and who probably possess under a totally different title.

The plaintiff is therefore declared, jointly with her children, to be owner of all the property formerly possessed by her husband *Abere*, which property is further declared to be a portion equal to that possessed by the then defendants conjointly in the lands inherited by them from their and *Abere's* common ancestors; provided that the share so awarded to the plaintiff shall not in any case exceed the extent obtained by her libel. No. 2,462, D. C. *Matura*. (J.)

Judgment not to exceed the amount claimed in the libel.

July, 5, (R. J.)

509.—*Baddeliyenegey Don Bastian* and others
v.
Dona Ageda widow of *Baddeliyenegey Don Siman*.

Res Judicata—Prescriptive Possession of Service-parveny Lands.

This was a suit touching a garden called *Pellewatte* which had already been the subject of five actions, owing to disputes between the same parties or their immediate connexions. Two of these suits, Nos. 13,606 and 13,681, had been determined by Marshall C. J., on the 11th October 1833.

In the former one, *Baddeliyenegey Don Bastian* (the present plaintiff) and the widow of *Wattegey Andries Fernando* sued *Liyeneraalegey Soesey Silva* for two-eighths of the above garden, which they stated he had unlawfully surveyed, though theirs by right of inheritance. The defendant answered that the *Pellewatte* which he had surveyed was another garden to the South of the one in question, the latter being *Paraveny*, the former *Ratmaharre*. The plaintiffs in their Replication, however, persisted that the garden surveyed was the one claimed by them and not the *Ratmaharre* land; adding that "from the land so surveyed by the defendant, one-eighth belonged to his father-in-law and his (the father-in-law's) brothers, and one-eighth to his mother-in-law and her brothers; and that these two-eights had been formerly surveyed (in January 1827) in the name of his, the defendant's, mother-in-law, in right of her and her husband." On reference to the survey of January

1827, it appeared to be the survey of "a part of a garden called *Pellewatte* the property of *B. Don Siman* deceased, now possessed by his wife *Dona Ageda*;" and bounded on the North-West, and South by the other parts, and on the East by the garden *Pellewatte-paale-owitte*; while the Survey in question (of the 14th March 1831) purported to be of a garden *Pellewatte-paale-owitte* "said to belong to the defendant." And evidence having been heard in this suit, it was proved that the garden in dispute was the *Pellewatte* and not the *Pellewatte-paale-owitte*; and that together with the then plaintiff's land, the defendant had caused to be surveyed a portion A, which had been surveyed by his mother-in-law in January 1827,—and with reference to which the plaintiff stated "which share the defendant's mother-in-law is entitled to, and they have no claim thereto." And the District Judge decreed "that the defendant should leave to the plaintiff the unmolested possession of that part of Pellewatte now in dispute marked No. 1." [In this suit it did not appear that the tenure of the land had been distinctly explained: though it was by implication pronounced to be *Ratmaharre*, and might also be said by implication to have been declared private property, and not service-parveny, since it was in part adjudged to a female and possessed by females.]

The other suit No. 13,681, against the same defendant arose out of the same survey and was brought for the remainder of the garden by other heirs, who claimed it by right of inheritance and purchase. It was again stated by the defendant to be *Ratmaharre*: but was on this occasion distinctly pronounced to be service-parveny: the plaintiffs (who claimed in right of females or by purchase) being thus non-suited.

The garden was thus distinctly declared to be service-parveny in the one case, and presumed to be inheritance or simple-parveny in the other. The defendant had thus won the former suit (No. 13,606) only for a time. He was only connected with the family by marriage, and four of the female heirs (parties to No. 13,681) having been defeated, the male heirs at once stepped forward

to claim possession. This gave rise to the three other suits Nos. 140, 400, and 497, all between the same defendants, (*L. Soesey Silva*) and the male branches of his wife's family: and these suits ended in the male heirs being finally confirmed in the possession of six-eighths of the garden, it having been declared on each occasion, in conformity to the decision in No. 13,681, to be service-parveny.

These four decisions having in the opinion of the present plaintiffs, settled the question as to the tenure in their favour as male heirs, they brought the present case to prevent the present defendant (the mother-in-law of the former defendant) disposing of the portions which in 1827 she had caused to be surveyed, and of which he had ever since been in possession. This action the District Judge dismissed with costs, his opinion being founded 1. on the admissions in the first case No. 13,606;—2. the circumstance that the defendant had not been a party to any of the other four cases, and 3. on Prescription.

The Supreme Court however reversed this decision, and *per* Jeremie J.—"Neither of the grounds alleged by the Court below is conclusive or satisfactory. It is true the defendant was not a party to either of the four last suits; but it is equally true she was not a party to the first. The decision in that case is not therefore a *res judicata*. With regard to her, therefore, the question is still open; and as to admissions made in the course of the case, it must be remembered that these were made only by one of the parties to the present suit, and at a time when the question as to *tenure* was not before the Court. All the female heirs were then in possession; they have all been since ousted by the conduct of her own son-in-law; and though this need not necessarily affect herself, still she must shew some additional title which renders her position different from that of the *other* female heirs, before she can expect an exception to be made in her favour. This additional title she does not shew; for even the survey is of land "belonging to her deceased husband"; and this survey, with the admissions, would prove at

Admission of a Party—how far binding.

best but an unmolested possession at the time it was made.

"The question is therefore narrowed to this, —Does the Ordinance relative to prescriptive possession avail against the Service-Parveny Regulation of 1809; or, in other words, can females or purchasers acquire a title to service-parveny lands as against heirs male, by ten years' possession.

Service-Parveny. No prescription against Male Heirs.

"The Court is of opinion that they cannot. Questions of tenure are matters of public policy, which are governed by rules perfectly independent of the private interests of individuals,—the latter becoming merely a secondary consideration. In the case No. 13,681, possession (for possession in that case was scarcely a debateable point,) was not allowed to avail against this law, and justly not; nor can it here: for though under the altered circumstances of the Colony, the policy of maintaining the Regulation of 1809 may be questioned, this is matter for the consideration of the legislature alone.

"The male heirs are therefore declared the sole proprietors of the garden *Pellawatte*; but without costs." No. 2,834, D. C. *Caltura* (J.)

510.—*Achy Umma* v. *Mahamadoe Lebbe*.

"On the motion of Mr. *H. Staples*, Proctor for the Appellant, stating that the District Judge of Caltura refused to receive the Petition of the Appellant in consequence of the stamped paper not having been purchased from the Secretary of the D. C. of Caltura: It is ordered that the said District Judge do receive the said Petition as an Appeal Petition. It matters not where stamps are purchased from." No. 8,567 D. C. *Caltura*, (J.)

Stamps.—The Court is bound to receive a document, wherever the stamp may have been purchased from.

July 12, (R. J.)

511.—*Caloeterie Goeroenanselagey* v. *Don Christian Arachy*.

"There are two points regarding the law of

Prescription.

Prescription, that should be always well borne in mind; or else from that law being a most wholesome one it may be rendered pregnant with injustice. The *first* is that a possessor is always presumed to hold in his own right, and as proprietor, until the contrary be demonstrated; the *second*, that the contrary being once established, and it being shewn that the possession commenced by virtue of some other title, such as that of tenant or planter, then the possession is to be presumed to have continued to hold on the same terms, until he distinctly proves that his title has changed. In the present case all the documents and much of the oral evidence shew that the defendant and his predecessors were the proprietors, the plaintiff and his predecessors the planters; and there is no document or other satisfactory and unequivocal proof to explain how or at what period these respective relations were changed, or that they ever have been changed. For the fact that the plaintiff was allowed, (being then the acknowledged owner, as planter, of part of the produce,) to sow a portion of the garden with vegetables, or to fence in the new plantation, proves, under such circumstances, only the forbearance of the acknowledged owner, and not that he had renounced his rights as proprietor. No. 2,889. D. C. *Caltura*, (J.)

Possession presumed to be adverse, unt l the contrary is shewn.

512.—In the matter of *Ponner Wyrewenaden*.

Application to sue *in forma pauperis*. Mode of Procedure.

This was an appeal against an order of the Court below dismissing a Petition praying to be allowed to sue *in forma pauperis*. The Court had entered into evidence as to certain statements made by and against the petitioner, and thereupon pronounced the order now appealed against.

JEREMIE J.—Although there can be little doubt of the ultimate result of the suit, yet these proceedings must be set aside for irregularity. The course to be adopted on applications to sue *in forma pauperis* is set forth in the 42nd and subsequent clauses of the *Rules and Orders*, and should be strictly adhered to. If there had been

a previous application, the order referring that application to a Proctor ought to have been, and no doubt would have been, recorded; and if so witnesses should not have been heard to that point until the records were duly searched. But according to the present proceedings, the case is disposed of *on the merits,* though the petition be merely to be permitted to sue as a pauper. The proceedings are therefore set aside, and the Petition is to be referred to a Proctor in the usual form; except legal proof be produced that a previous application of a similar nature has been rejected.

July 17, (J.)

513.—*Van Hek* v. *Martensz.*

Toussaint, Intervenient.

Ebell and others, Claimants.

This case was taken up on the 17th July on a petition presented by the Claimants. The facts of the case are fully set out in the Judgment.

Costs of party, who has been dropped in the course of the proceedings. Remonstrance against order of the S. C. Contempt of Court.

JEREMIE J.—On the 14th October 1836 the executors of the estate of J. Verwyck made application to the D. C. of Jaffna for certain papers belonging to *J. A. Martensz,* an Insolvent. This was opposed by two several persons, the Insolvent himself, and *F. A. Toussaint* as Attorney of Mr. *J. Vanderspaar;* and on the 25th October rejected by the Court.

"On the 2nd November the Executors filed their Appeal Petition; on which occasion they saw fit to omit the name of the 2nd opponent *Toussaint* as a party thereto; and further by an endorsement on the petition by the Executors on the one hand and *Martensz* on the other, the latter dated 11th November, it is evident that *Martensz,* and *Martensz* alone, was, in conformity to their own Petition, rendered a respondent to that appeal.

Various proceedings were then had in appeal. The case appeared twice in the Supreme Court, and the original decree was finally modified. This

led to additional proceedings in the D. C., which closed on the 2nd February last. In none of these subsequent proceedings whether in appeal or before the D. C., does it appear by the record that *Toussaint* was rendered a party.

" But the proceedings, being finally closed, the executors, on the same day, the 2nd February, moved that the costs of the appeal originating in the decree of the 25th October and the petition of the 2nd November, should be defrayed jointly by the opponent *Martensz*, whom they had made their respondent throughout, and the opponent *Toussaint*, whom they had left aside. And this motion having on the 6th February been acceded to, the order of that date was reversed by the Supreme Court on the 31st May last, inasmuch as regarded the appellant *Toussaint*, he alone having appealed; and the Court declared that he "*Toussaint* could only be rendered liable for the costs incurred in his presence and when he had notice to attend," in other words, that he could at the utmost but be charged with the costs, if any, of the appearances and orders of the 14th and 25th October, to which he was a party; and that he could not, on any imaginable principle of law or reason, be held liable for costs incurred in proceedings to which, from whatever causes, he had never been made a party; and therefore that he could not be called to pay any portion of the costs in appeal.

" On a matter so purely elementary and alphabetical, the executors have thought fit *twice* to remonstrate with this Court.

" On the first occasion, the Court in the hope of terminating all disputes consented to explain —what required no explanation—its original decree. This act of condescension has only led to a second reference, when the executors, without adducing any one single new fact, require to be heard a third time on the same plain and simple subject-matter : and they have, it appears, retained counsel. Heard, against the Court's deliberate and recorded judgment, counsel cannot be. It must be executed to the letter. But heard counsel may be, provided he be prepared to appear forth-

with, on this further question, which the Court feels bound in vindication of its own authority to determine, viz: What further penalty shall be levied on these parties, as a check on the remonstrances, which, as now advised, appear to the Court equally frivolous, vexatious, and puerile; and which has notwithstanding been urged over and over again, in defiance of all rule, with the most contumacious pertinacity. The execution of this Court's solemn and definite judgment is in the mean time suspended."

"On the following day the Court, after hearing counsel on this point, delivered judgment as follows:

19. July, (J.)

Remonstrance against an order of the Supreme Court.

JEREMIE J.—The Court will now proceed to examine the reasons assigned for this unpreceden-ted step. The remonstrants state that they could not render *Toussaint* a party to the appeal petition of the 2nd November. Why not? He had appeared in the cause, had filed and signed an objection, been heard upon and succeeded in establishing it in the Court below. What then was to prevent his being made a party to the proceedings—taken for the express purpose of overruling his objection in appeal? Nothing, either technically or substantially The respondents, when they required he should be condemned in costs, contrived to make him a party, and have kept him in the suit ever since. Why then not have made him so before? For, if he could become an appellant, he could be made a respondent. There is no limit to the possible number of intervenients; and every person who takes part in a suit and who is not either plaintiff or defendant, is an intervenient.

They next attribute the error or omission to the Secretary of the Court. What then? Is a party to be condemned uncalled, or rendered responsible in purse and person for proceedings to which he is a stranger, under any possible or imaginable contingency? If there be fault in the Secretary, he and he alone is responsible for his faults; but the fact is, in the present case,

there was none; the fault lay with the framers of the original petition of appeal.

The executors finally ask, whether the Supreme Court's decree of May is to affect *Martensz*? Did not *Martenz* appeal? If not, the Court is not likely to have committed precisely the same mistake that caused the reversal of the order of the 6th February, in coming to a decision on *Martensz's* interests, when *Martensz* had not applied to it: and this is already quite clearly explained in its decree.

Punishment for frivolous litigation.

As to the authority of the Court to award damages as costs, it has already expressed its sentiments in other cases. It is unacquainted with the practice of any appeal tribunal in modern or ancient legislation, which has not possessed and occasionally exercised as an undoubted part of its appellate jurisdiction, the power by an additional amercement to check frivolous and vexations litigation.

The Civil Law says "*Ne temere autem ac passim provocandi omnibus facultas præbetur, arbitramur eum qui malam litem fuerit persecutus, mediocriter pœnam a competenti judice sustinere.*" l. 6. § 4. Cod. *de Appell.* In England there are three established Courts of Appeal,—the House of Lords, the Privy Council, and the Lord Chancellor's Court; and in all these are increased costs thus awarded. In France, in Holland, the appellant formerly, as now, was invariably bound to deposit a fine which he forfeited, if the appeal proved frivolous. See among others, *Van Leeuwen,* p. 646. b. v. ch. 25. § 18. And that the Supreme Court possesses all the usual and accustomed rights and powers of Courts of Appeal generally, as well as that the tribunals established under the Charter, possess all the various rights and powers universally attaching to Courts of Law and Courts of Equity, appears beyond doubt or question. And that again, this power in particular has been occasionally, but of course discreetly, exercised by the Supreme Court, as now constituted, from the time of its institution, is a fact admitted.

It is true that by various Statutes passed for

the protection of persons charged with duties involving considerable responsibility, such as Justices of the Peace, it has been expressly enacted by the Legislature of Great Britain, that, if any persons who prosecute them shall fail in their action, such persons shall pay a penalty in the shape of double or treble costs; and these of course being penal statutes cannot bear any extension : but this is quite a distinct branch of the subject both as regards the principle and its application.

Then this pertinacious resistance to a final decree, whatever shape it takes, is in itself a contempt of the authority which pronounced the decree and as such punishable alike by every Court of Record. *Contempt of Court*

The executors are therefore, in addition to all other costs hitherto recoverable against them, adjudged to pay to the Appellant *F. A. Toussaint* the further sum of two pounds and ten shillings as increased costs for frivolous and vexatious litigation, and as an indemnification for the delay arising in the enforcement of the decree of this Court of the 31st May last.—No. 2,225, D. C. *Jaffna.*

514.—*Heerapittiye Lebbe* v. *Isoboe* and his wife *Pattooma.*

The plaintiff in this case claimed certain lands and moveable property, being the share allotted to his brother *Ismael Pulle* in their father's estate, on the ground that the 2nd defendant (the widow of *Ismael Pulle*) having no issue, was not, according to the Mahomedan law, entitled to any of her husband's property. The defendants (the 1st of whom had married the 2nd) pleaded that the property had descended on the 2nd defendant, as the widow of *Ismael Pulle*; that he had a daughter by her who survived him; and that the property had been bequeathed by *Ismael Pulle* to his widow and daughter. At the trial in the Court below, it was proved that *Ismael Pulle* had left a daughter; and oral evidence was also received in respect of the bequest alleged to have bee nmade by him. *Mahomedan Law—Oral Bequest of Real and Personal property.*

The Supreme Court pronounced judgment in appeal as follows:

"With regard to the bequest relied upon by the defendants, the oral testimony they have offered goes to confirm the fact. As regards the *personal* property, the Court therefore considers it as belonging to the defendants under the bequest. But *real* property cannot be orally bequeathed. It remains to examine what is the Mahomedan law in this particular.

"The Court has taken the best information it could obtain at Colombo,* and it appears that the mother was entitled to one-eighth (besides her *magger*, which magger however she must be presumed to have received); the daughter to four-eighths or one-half; and the collaterals to the remaining three-eighths. And as it appears that the plaintiff, according to his own statement in his Petition of Appeal, is only one of five collaterals, (there being three brothers and two sisters of the late *Ismael Pulle*, surviving or having left issue), it follows that he is only entitled to one-fourth of these three-eighths of the real property;—the rule of division among collaterals being that the estate is divided into eight parts, of which the brothers take six, and the two sisters two; so that as there are three brothers, the one-third of the sister is equal to two shares, or one-fourth of the eighth.

Rule of Division among Collaterals.

"It now becomes further requisite to ascertain who, according to the Mahomedan Law, are the rightful heirs of the deceased daughter. And it appears that the Mother is entitled to one-third, and the five collaterals to the remainder, which is to be divided in the same manner, viz: the uncles taking six shares in eight, the aunts the remaining two."

Heirs of a deceased Daughter.

Judgment was therefore given for the plaintiff for 3-32 (or $\frac{1}{4}$ of $\frac{3}{8}$); by right of inheritance from *Ismael Pulle*, and 1-12th (or $\frac{1}{4}$ of $\frac{2}{3}$ of $\frac{1}{2}$) by right of inheritance from his daughter; but con-

Cost---Contradictory statements of Plaintiff.

* The following special Assessors had been summoned, and sat at the hearing of the case,—*Ahamadoe Lebbe Segoe Mohamadin Casim Canecapulle, Tamby Rasa Capetar Aydroes Lebbe Markar, and Osseen Lebbe Capitar Ahamadoe Lebbe.*

sidering the numerous contradictory and untrue statements made by the plaintiff, and the exorbitance of the original demand, the Court condemned him in costs, except those of Appeal, which were divided. And taking the value of the real property at 160 *riddies*, the defendants were adjudged to pay to the plaintiff the sum of 28 *riddies*, deducting the costs of the suit. No. 1,056, D. C. *Maddewelletenne*, (J.)

515.—*De Breard* v. *Tennekoon*.

Proof of a Bond. Attesting Witnesses. Comparison of Handwriting.

This was an action on a Bond; which the defendant denied. After evidence had been heard, the Court below gave judgment for the plaintiff. The Notary, a reluctant witness, could not, when pressed, deny his signature to the Bond; but the two attesting witnesses were unable to identify their signatures. Two other witnesses however had spoken to the authenticity of the Bond. The Supreme Court in Appeal, held the Bond to have been sufficiently proved; and *per* JEREMIE J. "It is to be hoped that constable *Alt's* curious doubts and ignorance as to his own signature may be attributed to the lapse of time; for that it is a forgery no one will believe who is in the least accustomed to compare signatures, and who compares his signature to this Bond with the signature to his present deposition. And here the Court thinks it fitting to observe that on general principles it is inclined to credit the authenticity of documents of this nature, rather than even inferentially to impute conspiracy, forgery, and perjury to parties and witnesses. The truth is much more easily denied than a circumstantial tale supported by documents of this nature invented; and a debtor's conduct in denying his signature is less dangerous and more intelligible than that of a stranger or creditor in forging it. In this instance the Court entertains not a doubt of the authenticity of the original document, or that it is as well proved as under the circumstances it can be. No. 1,165, D. C. *Caltura*, (J.)

516.—*Silva Cangany* v. *Arnaselam Cangany.*

The facts of this case were almost similar to those of the foregoing. The Supreme Court pronounced judgment as follows:

Proof of a Bond.

"The contradictions in the testimony of the plaintiff's third witness are on points purely collateral; he swears distinctly to his having drawn up the Bond and to its due execution, whilst minor discrepancies are fully explained by the lapse of time; and this testimony, corroborating as it does the evidence of the second witness, greatly outweighs the suspicious testimony of the first, who begins by denying a knowledge of any dealings whatever between plaintiff and defendant, and then recognizes his signature, a circumstance which he accounts for very unsatisfactorily.

Minor Discrepancies in evidence.

Authenticity of Documents presumed.

"The Court on general principles is inclined to credit the authenticity of documents of the description of this Bond, rather than on slight grounds to impute forgery and double perjury to a party and witness. It can understand why a debtor will be prone to deny his signature, and how a single witness may at the expiration of seven years have lost sight of the actual circumstances of a case, much more easily than that three persons—the last evidently a reluctant witness—should, without any grounds, expose themselves to the terrific penalties attaching to such crimes.

"Nor is it an immaterial circumstance that the first witness was produced by plaintiff, which he would scarcely have done had he had any doubt of the integrity of the transaction, without being first assured of the testimony he was likely to obtain.

Comparison of Handwriting.

"Finally on a mere comparison of the signature to the Bond, with those attached not only to the Power of Attorney, but to the defendant's answer,—the Court would entertain little doubt, if any, of the authenticity of the former.

"The decree of the Court below is therefore reversed, and plaintiff's entire claim adjudged to him."—No. 3,536, D. C. *Putlam,* (J.)

517.—*Lokoebadalliyenegey* v. *Castoribadalgey.*

Possession—Presumptions arising from.

"The plaintiff in this case claims a portion of the planting share of certain gardens. It is admitted that he was formerly the owner of a portion of the ground also; that this portion was sold about six years ago under a writ of execution, and that even then the plantiff claimed and wished to have his portion of the planting share sold also, but that it was disputed The inference from the circumstance of the ground having been *separately* sold, and which is principally, if not solely, relied upon by the defendant, falls to the ground. It is also admitted that the plaintiff though deprived of his ground-share has ever since resided in these gardens, both which now form one; and this leads to the presumption, though certainly not to the proof, of some remaining interest in the gardens. But he further proves by several witnesses that he was the acknowledged planter of some portion of these gardens; one witness gave him the plants, and another aided him in planting; and this, for a transaction of 30 years' standing, is quite as strong proof as can be expected. And he also proves that within the last 2 and 3 years, and therefore subsequently to the sale of his ground-share, he has shared in the produce of the garden. This clearly shews some remaining interest.

Proof of an Interest in Land.

"What then is that interest? He claims one-fourth of the planter's share of the second plantation; and this is precisely the amount reserved, as evidently belonging to another, in a lease of the 10th January 1832 of one-fourth of the same garden, made by the mother-in-law of the 1st defendant, and to which not only is the 1st defendant a witness, but on which, as appears by the endorsement, he personally received the arrears. And these are circumstances of which the 2nd defendant (the purchaser of plaintiff's ground share, and previously a lessee,) cannot be presumed to have been ignorant.

"The plaintiff is therefore quieted in the possession of the one-fourth of the planter's share of the 2nd plantation."—No. 2,340, D. C. *Caltura*, (J.)

518.—*Domingo Fernando* v. *Petronella Justina Potsnitz,* Administratrix of *Alphonso.*

Planting-share —Compromise —Right to the Land.

"A planting-agreement was entered into by the plaintiff and others with the defendant's late husband, on the 6th March 1820. Its provisions are no doubt harsh, and were it now a question whether it should take effect, it would in all probability be very considerably modified in regard to the penalty and forfeiture. A suit was however commenced on this agreement by the defendant's husband against the present plaintiff, in the year 1826; which suit (No. 1,552, Prov. C. *Colombo,*) was finally determined by compromise, on the 22nd October. The Record of that day contains the following entry:—"The defendant states he has entered into the agreement to pay to the plaintiff, in 30 days, six fanams for every tree not planted according to his agreement, and resign all claims on the trees planted by him." And judgment was entered up accordingly. The original agreement bound him down to pay Rds. 2 forfeit for every unplanted tree; so that three-fourths of the forfeit money was thus remitted. The defendant in that case has however continued to occupy the ground, and has occasionally plucked fruits from it; and he has now brought the present suit against the former plaintiff's administrator to recover a sum of £15. as the value of the planter's share of the garden, which the defendant is alleged to have sold. To this the defendant pleaded the former judgment. And the only question for the Court is in what capacity has he occupied the property since that judgment?

No less than seven witnesses swear that it was as *renter;* he denies that it was by virtue of the interest he had expressly forfeited under the compromise in the former case. Under these circumstances, the Court can have no hesitation which to believe, especially when all the witnesses of the plaintiff, except the 2nd and 3rd, prove only what is not disputed, viz: that *he has planted;* whilst both the 2nd and 3rd, though they say that he has retained his planting-share (in which however they are contradicted by the 6th,

who says that the plaintiff's share has not been given to him as yet ;) also admit that he has held as renter ; which shews that, to the full knowledge of both, he did stand in the relation of a tenant to the defendant.

"The decree is therefore reversed in favour of the defendant; but, in consideration of the extreme vigour of the covenants in the original agreement, under which the plaintiff has forfeited his planting-share, without costs.—No. 1,238, D. C. *Negombo*, (J.)

519.—*Udagahapattoegey* v. *Kudaliyenegey*.

"From the depositions of the 1st witness, it is proved beyond question that the plaintiffs had not at the time they entered this suit, nor have they now, a particle of interest in the cause ; and they are made parties only to enable the real party (the 1st witness) to give evidence in his own favour,—a proceeding contrary to every principle, and which if countenanced, must lead to a total perversion of justice. Should the 1st witness enter an action, then will be the time to ascertain who is the true proprietor of the property in dispute ; but it is certain according to their own evidence, the plaintiffs are not. They are therefore non-suited with costs."—No. 3,212, *Caltura*, (J.) Plaintiff's interest in the suit.

July 20, (J.)

520.—In the Estate of *Seyedoe Mira Lebbe Mahamadoe Lebbe Marcar*.

The deceased left a Will, appointing his wife the executrix ; but the grant of Probate to her was opposed by two of the creditors, Messrs. *Ackland and Boyd* and Messrs. *Groves & Co.* The question having been argued in appeal,—the following order was ultimately agreed to by the parties : Administration to a creditor, with consent of the Executor.

"The parties having agreed between themselves that *Edward Darley* Esquire should be appointed administrator with the Will annexed, it is ordered that the said *Edward Darley* be appointed administrator, with the Will annexed, but without security, in conformity with the arrange-

ment signed by the respective Proctors of the parties."—No. 16,792, 16,770, D. C. *Colombo*, N. (J.)

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521 — *Warnecoelle Aratchigey* and another v. *Magerita Perera* and another.

Banns of Marriage—opposition to.

Estate of predeceased parent left unsettled.

" The broad general principle is, that a publication of Banns can only be opposed on grounds which would render the marriage unlawful. And in confirming the decree dismissing the opposition, the Supreme Court felt inclined to lay down that principle simply and without qualification. It appears, however, that so far back as the year 1780, a resolution was passed by the Councils of Ceylon, by which on the decease of a Father or Mother leaving children under age, the survivor is not allowed to re-marry, until the property has been inventorized and the orphan's *portion* secured to them ; and by its decree of the 1st July 1835, (No. 1,502 D. C. *Caltura**), this Court enforced this regulation, so that it cannot but be considered law.

But being an exception to the general law, it must be restricted within its original limits. In the case No. 1,502, the child was a minor : the resolution has reference only to minor children ; and to the cases of minor children only can it therefore be made to apply. Here the parties opponent are neither the children of the survivor, nor is either of them stated to be a minor : they are the mother and brothers of her first husband; and as the right of opposition belongs but to the children by the previous marriage, during such children's minority only, the Court on the double ground of non-affiliation and want of minority, confirms the decree.—No. 606, D. C. *Caltura* (J.)

July 26, (R. J.)

522.—*Warnecoellearachigey* v. *Warnecoelle Aratchigey*.

Hearsay Evidence.

" It appears in this case by some of the depositions, that there was an old fence in the garden in dispute, and that the defendant has removed it

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* See *ante*, p. 52, by 223.

and erected a new one, which seems to have given rise to this suit. The size of the garden itself is very doubtful; so that it is in fact difficult to tell whether the parties have any cause of dispute at all. True, much of the evidence is hearsay; but the above facts seem tolerably well-established by positive testimony; and even hearsay, though utterly inadmissible as to matters of present or recent occurrence, is admissible and often the only testimony in questions of ancient occupancy, descent, or ancestry. The decree of the Court below (which was for the defendant) is therefore set aside, and the case remanded for a survey of the land in dispute, and further evidence on both sides.—No. 3,250 D. C. *Ruanwelle*, (J.)

Ancient Occupancy, Descent or Ancestry.

23.—*Mahawelletenne* v. *Wellegedere M. Banda*. *Dangammene Basnaike Nilleme*, Intervenient.

Res Judicata—Collusion between the parties.

Authority to act as Curator *ad litem*.

These proceedings are intimately blended with the suit No. 7,601 between *Dehigamme Lekam*, as guardian of one *Punchy Menika*, and the present defendant; which suit was determined by a decree of this Court of the 4th February 1835. That decree is of course final and irreversible, except under two hypotheses: 1 of Collusion between the parties to both suits; and 2, if the Infant was not duly represented. But the evidence in this case tends to excite suspicion on both points. It is therefore, necessary that they be fully enquired into in presence of the parties to either suit; and it is ordered in consequence, that the case be referred back to the D. C. for the following purposes:

1.—That the said *Dehigamme Lekam*, guardian of the said *Punchy Menicka*, and the said *Punchy Menicka* herself, be called to intervene in the present action,—the D. C., in case the latter should be still a minor, appointing some competent person to assist her.

2.—That the said *Dehigamme Lekam* be called upon to shew by whose nomination and under what authority he undertook to act as guardian in the preceding suit; and to explain if he is rela-

ted to either of the parties; and if so, in what degree: either party being at liberty to offer testimony on these points

3.—For further evidence in support, or in refutation, of the collusion on the occasion of the suit No. 7,601.—No. 940, D. C. *Ratnapoora*, (J.) *

524.—*Toussaint* v. *Herft*.

Postponement, Plaintiff being unprepared for trial, in consequence of Defendant's misrepresentation.

"It appears that issue being joined in this case, the Proctor for the plaintiff appeared on the day of trial, and stated that he had refrained from summoning witnesses to prove his bond, owing to a letter he had received from defendant, which he produced, and which he construed into a promise of payment; on which his case was struck off with costs.

"Had plaintiff failed to appear and defendant been ready to proceed, the Court would not have done otherwise than it did,—the 24th Rule leaving no alternative; but that rule does not apply to this case, nor is there any that does; so that the Court in first instance, as in appeal, is unfettered in its discretion. And it appears to the Supreme Court that under the circumstances, the payment of the costs hitherto incurred, is quite a sufficient mulct for the plaintiff's omission (an omission caused by the act of the defendant) without compelling him in so simple a case, to commence anew. The case is therefore to be reinstated, and the parties are to proceed to a trial, but without any reimbursement of the costs hitherto incurred, which it seems have been paid. The costs of this appeal are to stand over and abide the definitive issue."—No. 3,234, D. C. *Jaffna*, (J.)

525—*Wattoeyagamegey* v. *Kiriyalle-Badahelle*.

A sudden change in the course of a river, whereby land is transferred from one bank to the opposite, does not alter the property.

"It appears that some years ago a river which flowed between the lands of the plaintiff and the defendant, suddenly changed its course, leaving part of the plaintiff's property, to the extent of about three cornies, on the defendant's side. The

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* See *infra*, Dec. 20, 1837.

defendant took possession of this share, asswedumized it, and appears to have continued to cultivate it peaceably for about five years; several of the plaintiff's own witnesses agreeing that it never was asswedumized before.

Qu? as to the rights of a party, who has asswedumized the land of another.

"The plaintiff now claims the field back; and he is entitled so to do. A sudden and perceptible change in the course of a River, or a transfer of a large portion from one bank to the opposite, does not alter the property, though a gradual and impereceptible increment belongs to the owner of the land thus enlarged.

"So far therefore the Court would feel inclined to confirm the decree; but the defendant has asswedumized the land for some years without any interference on the part of the plaintiff, whose continued silence, though it cannot be construed into an abandonment, certainly amounts to an assent to the improvement. What then are the terms on which land belonging to one person, but which another has asswedumized without any precise stipulation of share, is thenceforth held? On one occasion it was reported to this Court that the asswedumizer became the proprietor of one half. As however *Sawer* is silent on the subject, and tho Court is not aware of any direct enquiry having been instituted under its authority, for the purpose of settling this very material point, this case is referred back for evidence on both sides, as to the share, if any, which an original asswedumizer by consent of the proprietor, but without any distinct stipulation of shares, is by custom entitled to, in *Saffragam*, in the land so asswedumized." No. 1383, D. C. *Ratnapoora*, (J.)*

256.—*Merinhegey* v. *Merinhegey*.

A Proctor not bound to uphold a case which he conceives to be groundless.

The Petition of Appeal in this case contained the following entry at the foot:—"As Proctor, and one of the drawers of papers here, I am compelled to sign this Petition; but am of opinion that the Petitioner has no cause of Appeal whatever."

Held *per* Jeremie J. that the Proctor was in

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* *Vide infra*, October 18, 1839.

error. A Proctor is not in a Civil suit bound to uphold officially a case which he conceives perfectly groundless or iniquitous; though where there is a fair and reasonable ground of defence, he is at full liberty to act in a cause, whatever may be his private opinions of its merits. But he should first state that opinion to his client. He is not expected or required to mention it elsewhere. No. 3319, D. C. *Caltura*, (J.)

257.—*Kirioroome Meera Lebbe* and another v. *Raggamana Ahamado*.

A woman, under coverture cannot appeal.

Where a wife under coverture had alone presented a Petition of Appeal, *held* that the document was void; and the decree of the Court below was affirmed. No. 1888, D. C. *Matelle*, (J.)

August 2.

258.—*Dias* v. *Perera*.

Grounds for a Postponement. Discretion of the Court below, open to revision in appeal.

Whenever on the day of trial either party states grounds for not immediately proceeding, which appear to the Court reasonable and satisfactory, it is at full liberty to order a postponement on such terms with regard to costs and other incidental points as the case seems to require; nor is there anything in the 24th Rule or any other to fetter the Court's proceedings in this respect. But this exercise of its discretion is liable, as on other occasions, to revision and controul in Appeal.

Absence of Counsel or Agent, may be a ground for postponement.

The unavoidable absence of Counsel or Agent is a sufficient reason for delaying a hearing, so long as the Court is satisfied that the joint interests of the parties and the public will not be materially prejudiced by its so doing.

A postponement cannot however be insisted upon, as a matter of right, merely on this ground.

The decree of the D. C. is therefore set aside; —and it is ordered that the case be reinstated on plaintiffs discharging all the costs of the day and of the Appeal. No. 13,263, D. C. *Colombo*, (J.)

August 9. (J,)

259.—*Garehingey* v. *Garehingey*.

A party claiming title by prescription, if proved to have been originally a mere cultivator, is bound to shew when his title became adverse.

This case in which the right to certain lands was in question, had been sent back on a previous occasion for further evidence on the part of the defendant, the Supreme Court observing that "it fell on the defendant, who was proved to have been originally the cultivator of the land in question, to shew when his title became adverse to the plaintiff, the original proprietors; and that he had undisturbedly possessed under such adverse title for ten years from the plaintiff's majority." The case having come a second time in appeal, the Supreme Court pronounced judgment as follows:—

"The defendant has not shewn when his title became adverse, for the deed is not better proved than it was before, the late Modliar who made the endorsement having continued in office until 1829; nor has he called a single additional witness to possession: his whole case therefore rests on testimony already pronounced insufficient.

"On the other hand plaintiff has adduced the additional witnesses, who corroborate the preceeding witnesses' evidence in his favour, and prove not only plaintiff's recent possession, but that the field in dispute was mortgaged by his mother and held for many years by the mortgagees, (defendant being always the cultivator), subsequently to the date of the Deed of Sale, said to have been passed by him, then a minor, and his Sister, then under coverture, in 1813; and all the witnesses who depose to this fact are the nearest neighbours, to whom not a shadow of suspicion attaches and whose testimony agrees on every material point.

"The Court cannot therefore but consider this as another attempt on the part of a mere holder to usurp the title of a proprietor."

The decree of the Court below was therefore reversed, and judgment entered for the plaintiff. No. 2,343, D. C. *Maturà* (J).

The claim of the children of a predeceased spouse on the property of the survivor, amounts merely to a mortgage, giving them priority in respect of their share over subsequent creditors or purchasers.

260.—*Turnour*, Attorney of *Matthews* v. *Rosairoe.*

The judgment of the Supreme Court in this case fully sets out the facts:

"*Jeronimus de Rosairoe* of *Calpentyn* is a prisoner for debt at *Colombo*, under various writs of execution; and the children of his first wife claim a large portion of his ostensible estate. His affairs have in consequence been repeatedly brought under the consideration of the District Courts, of *Colombo, North* and *Putlam.*

"The following cases are now immediately or incidentally before this Court, *Putlam* 1,923, *Colombo, North,* 2,983, 5,316, 9,568, 9,930, 13,227, 16,791; and these, combined, bring the whole of the principal parties, together with the various questions now pending in both Districts before the Court. The parties are the debtor, the chief creditors, and the children, as heirs of the first wife; and the questions have reference, 1st to the conduct of the debtor as it affects himself, 2ndly to the liquidation of his estate.

"On the first point, the District Court of *Colombo, North,* has by its decree in the case No. 2,983, dated 4th July 1837, pronounced him, in effect, a fraudulent insolvent, and adjudged him to suffer twelve months imprisonment computed from the day on which his conduct was investigated. It further delares him not entitled to the benefit of the Legislative Enactment No. 6 of 1835, "passed for the relief of honest Traders"; and it has come to this opinion owing to his having mortgaged to others 'property which he at the time knew belonged to the estate of his deceased wife and was subject in preference to his children's claim.'

"That the District Court has formed not an incorrect judgment of the generally reprehensible conduct of this debtor, as shewn by the papers now before it, this Court believes. But in matters of this moment, whilst concurring in a great degree in the view expressed by the Court below, the Supreme Court feels bound to notice one or two specific points in that judgment, in which the language appears to admit of a mistaken construction.

"The Ordinance No. 6 of 1835 applies alike to all cases of Bankruptcy and Insolvency, whether the Insolvent be in or out of Trade, honest or fraudulent; provided he has not laid himself open to a prosecution for some specific criminal offence. If fraudulent, it punishes under the 39 Clause, and thus it postpones, but does not deprive him, of his discharge; if not, it gives him prompter relief. Again, the part of the Ordinance alluding to Bankruptcy relates principally to Traders, the remainder to Insolvents who are not in trade.

"Nor 'does any part of the property held by *Rosairoe* belong to the estate of his deceased wife' The whole estate is as completely his, in point of law, as if he had never married; the children's claims merely amounting to a mortgage,—a lien by operation of law,—which gives them priority or a preference over all subsequent creditors or purchasers for the actual value of the mother's share of the community at the day of her death. But the children are entitled to no specific share of the property as owners; and as these rights attach to them by *law* and not by contract, the opposing creditors are presumed to have been as well acquainted with them as the debtor himself; for that he had married a first wife who had left issue, was too notorious a fact for a subsequent mortgagee not to have ascertained, if he had used ordinary diligence.

The Supreme Court draws therefore its inference as to the misconduct of the Insolvent from the immense mass of needless litigation before it,—which is a deliberate squandering of the estate,—as well as from his behaviour with regard to these very claims of his children, which he was strenuously contesting in one Court at *Putlam*, whilst he acknowledged them in another at *Colombo*. When his children sued him, he owed them comparatively a trifle, and resisted to the last the recovery of this trifle. When his other creditors sued him, he brought forward the same claims, acknowledging them at once, to neutralize their proceeding,—conduct which cannot be overlooked, though it does not amount to that species of premeditated fraud in contracting debts, which

the opposing creditors seem to have contemplated.

"Passing to the question arising from the proceedings held for the purpose of liquidating the estate,—it appears that the sale of the estate on the part of the creditor under writs of Execution in the suit Nos. 16791, 9508, 9930 and 13227, *Colombo*, is opposed by the children in the suit No. 16791, *Colombo*; and the sale on the part of the children is opposed by the Insolvent in suit No. 1923 *Putlam*, whilst the same Insolvent is claiming the benefit of the Ordinance No. 6, of 1835, at Colombo in the suit abovementioned No. 2983.

"This renders it at once necessary to consolidate the whole of these suits, and by transfering them to one Court to prevent a multiplicity of actions and cross-decisions.

"Considering them as consolidated, it follows that the Insolvent having filed his Petition for relief, he is bound to assign his whole estate under clauses 14 and 48 of the Ordinance, or the District Court will do it for him under clause 48; and this does away with all possible opposition from him: and he is from that moment a stranger to the proceedings, and no application from him tending to stay the liquidation can be entertained.

"With regard to the children's objection to the sale, the explanation already given to the nature of their claims, determines the value of their opposition. Their mother's estate is merely a creditor among creditors, privileged it is true—but still a creditor. Nor indeed is the amount of the claim yet ascertained, as it must be in presence of the Assignee of their father's estate. In the mean time however they have applied for alimony, in the case No. 1923, *Putlam*; and, as the Court conceives, on very sufficient grounds.

"The various questions before the Court having been thus discussed, it remains for it to pronounce its decree, in conformity with the opinion it has expressed.

"And in consequence, *first*, it is considered and adjudged, as regards the decree of the District Court of *Colombo, North*, dated 4th July 1837, that the term of the imprisonment be

mitigated to twelve months from the date of the Insolvent's filing his petition for relief, under the Ordinance No. 6 of 1835,

"And, *secondly*, as regards the liquidation of the Estate, it is also considered and adjudged,

Order for Transfer and Consolidation of several suits.

"1st.—That the suits No. 2983, 9568, 9930, 13227, and 16791, from the District Court of *Colombo, North*, and the suit No. 1923 from the District Court of *Putlam*, (the suit No. 5316 *Colombo, North*, though connected, being at an end), be consolidated and combined; and that the whole of these cases be referred to the District Court of *Colombo, North*, where all further proceeding with regard to the liquidation of the estate of the said *Jeronimus de Rosayroe*, are to be held.

"2nd.—That the opposition made by the Insolvent to the sale of his property, real or personal, in the suit No. 1923, *Putlam*, as well as the opposition made by the children, to the sale of any such property by the creditors, in the suit No. 16791, and all other oppositions whatever, if any, on the part of the said Insolvent, or children, to the said sale, be set aside; and that the said District Court of *Colombo, North*, proceed, in consequence, to the liquidation of the whole estate of the said *Jeronimus de Rosayroe* in manner following:—

"1st.—That it call on the prisoner, in terms of the 48th section of the Ordinance No. 6 of 1835, forthwith to assign his estate, for the benefit of his creditors; and that in default of his so doing, the Court proceed to assign it for him.

"2nd.—That the assignee do then (subject to the orders of the Court) proceed to the sale of the real and personal property, belonging to the estate, at such times, and in such manner, as shall appear to him, (or to the Court), most advantageous to the creditors; and that in case of difficulty as to the distribution of the proceeds, the value be laid out temporarily in securities, public or private, approved by the Court, or deposited in case of opposition by the creditors or children, in the public Treasury.

"And with a view of settling the amount of the children's lien, it is also decreed that the Court do in the presence of the assignee, and of any of the creditors, who at their own personal cost may see fit to appear, proceed to follow up the proceedings in the suit No. 1923, *Putlam,* and to ascertain the clear value of the said Jeronimus de Rosayroe's first wife's interest, in the community existing between her and her husband at the period of her decease.

"And it is further decreed that the functions of the Official Administrator nominated in the said suit, No. 1923, *Putlam,* do cease and determine, the said administrator being duly allowed all reasonable costs and charges for the duties he has performed; and also that an alimony of three pounds per mensem, be allowed to the children of the first wife, payable from monies now in the hands of the commissioner, administrator, or assignee, or from the first monies to be received by them; the said allowance commencing from the day of their father's imprisonment; and that such alimony continue to be paid until the affairs of their mother's estate be liquidated.

"*Finally,* it is ordered that the whole of these cases be remitted to the District Court of *Colombo, North,* and that a copy of this judgment, be transmitted by the Registrar of the Supreme Court, to the District Court of Putlam."—No. 2983, D. C., *Putlam,* (*J.*)

Gintotte-parene-vidanegey vs. *Don Juan and others.*

The absence of a party is not in all cases a good ground for postponement.

"Although a D. C. is always at liberty, subject to controul in Appeal, to grant a reasonable time to the plaintiff or defendant, for the purpose of bringing all the parties together, (which is generally the most convenient course); yet the circumstance of one or more joint defendants being absent, or not be found, by no means renders continued postponements an incumbent duty. The case can be decided between parties who are present, leaving it to the plaintiff to

follow up his proceedings by default, against the absentees, and to the latter, to defend themselves when they appear.

"It appears also to this Court that these proceedings might have been much simplified, if instead of entering a fresh action, the plaintiff had adopted the practice established at *Colombo* of simply moving for a rule, to shew cause why the former judgment should not be revived, and execution issued thereon."—No. 1814, D. C., *Matura*, (*J.*)

A superannuated judgment may be revived on a Rule Nisi.

Soemenejooty Teroonanse vs. *D. Juanis Jayawickreme.*

"A final decree cannot be altered by a D. C. But Judgments preparatory, and interlocutory, may at any time, previous to the final decree, be altered, amended, or even retracted."—No. 803, D. C., *Matura*, (*J.*)

A. D. C. may alter its interlocutory, orders, but not its final decrees.

August 15, (*J.*)

Barton vs. *Eyhingert and others.*

In this case the plaintiff having on the 7th February 1837, obtained judgment against the 1st defendant as principal, and the 2nd defendant as his surety, issued Writs of Execution against them. The 1st defendant was brought up on the 30th May and committed; but on the 19th June following, on the motion of the plaintiff's Proctor, he was discharged; and the writ of Execution was re-issued against the 2nd defendant. On the 2nd defendant being brought up, however, he objected to his committal on the ground, 1st, that the plaintiff and 1st defendant had agreed, and sold the property mortgaged to the plaintiff, without the knowledge and concurrence of the 2nd defendant, (such a proceeding necessarily releasing the security, as declared by the Supreme Court in No. 2004 and *secondly*, that the plaintiff had not persevered in such peremtory manner against the principal debtor as would probably have secured payment

1. A Surety who, after notice, does not object to the Sale of the mortgage, is not thereby discharged.
2. A creditor by discharging the principal from gaol, without the consent of the Surety, thereby discharges the surety.

from him; inasmuch as though arrested, he had been since discharged at plaintiff's application, without the knowledge or consent of the surety.

It was admitted by the plaintiff's Proctor that the mortgaged property had been sold, and the proceeds applied in payment of the defendant's debt; but he also stated that he had communicated to the 2nd defendant the intention to sell the property by private sale, but had received no answer. It was admitted also that the 1st defendant had been discharged from custody without consulting the 2nd defendant. The Court below upheld both the objections, and discharged the 2nd defendant.

On appeal the Supreme Court pronounced judgment as follows:—

"The notice given by the plaintiff to the defendant of the arrangement respecting the sale of the house, to which notice he as surety made no answer, would, if proved, be sufficient to set aside the *first* plea. But on the second, the discharge of the principal, without the consent of the surety, amounts beyond doubt to a discharge of the surety." No. 3,617, D. C. *Galle* (J.)

Fernando v. *Ahamadoe Lebbe.*

Every Village is entitled to have a cart-road, on indemnifying the owners whose lands are taken for that purpose.

There can be no doubt that every village is entitled to have a cart-road, and if there is none to apply for one; but then they must do so in due form, and will be expected to indemnify the proprietors of the land adjacent. The road will also be made to take the least inconvenient line. No. 2,822, D. C. *Caltura*, (J.)

September 15 (R.)

Gooroenanselagey v. *Liyeneachigey.*

Security in appeal cannot be accepted after the appointed time, unless by consent.

Where the security in appeal had been offered long after the due and affixed time, *held* that it could not be accepted unless with the assent expressed of the plaintiff. No. 1,333, D. C. *Amblangodde.* (R.)

September 20, (R. St.)

Blevin v. *Jonklaas.*

The rule of Court, in furtherance of the design of the Charter, permits at any time during the proceedings, of an oral examination, at the discretion of the District Judge, of the parties, plaintiff and defendant, litigant. In reference therefore to this rule, it does not appear that the Proctor of a party can equitably claim an exemption beyond that which is given to his client. The Court will itself decide on the relevancy of the questions put, and on the expediency of the answer. No. 3,469, D. C. *Ruanwelle,* (R.)

The D. C. has discretion to allow the examination of a Party or his Proctor at any stage of the case provided the questions are relevant.

October 18, (R. J.)

Rasi Umma v. *Cutty Nakooda.*

The judgment of the Supreme Court in this case fully sets out the facts :—

" So far back as the 11th May 1818, the present Respondent obtained a decree against the executor of her late husband *Hadjie Ismael Nacoodah's* estate, for four boutiques bequeathed to the said husband, and subsequently in January 1825 she obtained another decree for the arrears of the rent of this property.

" On proceeding to enforce these judgments, she was opposed by the present Appellant *Moolary Mohidien Cutty Nacodah*, who assumed the quality of agent of one *Coenjie Pakey Cavey*, heir to the above *Hadjie Ismael Nacoodah.*

" This opposition was however, set aside with costs by decree No. 1,307.

" When the plaintiff was on the point of enforcing this last decree, *Mr. V. W. Vanderstraaten* as official Administrator of the same *Coenjie Pakey Cavey*, interposed, he having under a decree of the then Supreme Court seized and sequestered the estate of the said *Coenjie Pakey Cavey.*

" Upon this another action was commenced against the Administrator in July 1835, and the

On a judgment obtained by a Legatee against the Executor, for the rents of the property bequeathed she had seized a sum of money lying in deposit in the Treasury. This sum had been deposited by the Administrator of an Heir of the Testator, (in pursuant of a judgment against him at the instance of the Legatee) as a dividend allotted to the Legatee on her claim.

Held that a third party claiming under such heir had no remedy as against

the Legatee, so as to prevent her drawing the money from the Treasury.

defendant having on the 9th November entered a distinct admission of the claim "as per judgment," but objected to paying the costs of suit, a decree (the fourth in the cause) was passed on the 11th, recording the admission of the debt, but adjudging the defendant to pay costs, which last clause led to an appeal on the part of the defendant. In appeal the latter put in a written statement, setting forth, *first*, a denial that the present appellant *Moolary Mohidien Cutty Nacodah*, the opponent in the *third* suit, ever was authorised to represent *Coenjie Pakey Cavey*;—and *secondly*, that this very debt which the official Administrator had himself distinctly admitted in his answer of 9th November 1835 to be then due, had on the contrary long since been paid and satisfied by the deceased's agent *Mr. Gibson*. On these grounds the case was reopened by decree of the Supreme Court of the 18th January 1836, and referred back for further investigation to the District Court of *Galle*. This decree is as follows :—

"'*The proceedings in this case having been read and explained by the Court to the Assessors. It is considered and adjudged that the decree of the District Court of Galle, in this matter, be set aside: the case nevertheless to be proceeded in; the plaintiff being at liberty to produce such further evidence, if any, as she may stand possessed of in support of her libel, and with full power to the defendant to make his defence as official Administrator. The costs of the present proceedings to be defrayed by the plaintiff.*'

"On re-appearing before the District Court, the official Administrator attempted to prove neither of the allegations contained in his statement in appeal, but reverted exclusively, as appears by the proceedings dated 11th October and 23rd December, to the question of costs,—which was in fact the only point reserved by the decree of November 1835, passed on his own admission. The District Court in consequence, on the said day, 23rd December 1836, proceeded to pronounce its *fifth* decree in favor of plaintiff

which decree was affirmed by this court on the 23rd February 1837.

"The Plaintiff and Respondent having on these decrees sued out a writ of execution against the official Administrator, the latter, on the 28th April, announced to the Fiscal of the Western Province, that a sum of £54. 1. 1. was deposited in the Treasury allotted to *Rasi Umma's* claim of £97. 7. 6. by dividend. But when the latter was on the point of receiving this sum, *Moolary Mohidien Cutty Nacodah*, the author of the opposition to the two judgments originally obtained against the executor of *Hadjie Ismael Nacodah*, the same person who had been taxed by the official Administrator with having falsely assumed to himself the quality of agent of *Coenjie Pakey Cavey*, the individual, in short, by whose instrumentality the Respondent has been hitherto deprived during twelve years at least if not during the whole nineteen, of the benefit of five distinct decrees of the local Court, several if not all difinitively confirmed in Appeal,—again opposed the payment. This opposition was notified to the Fiscal on the 16th May by letter from the Proctor stating that his client had obtained on the 8th January 1836 a judgment against the official Administrator of *Coenjie Pakey Cavey* for £520, and he therefore called on him "not to divest himself of any sum of money he may have seized or be about to seize by virtue of the writ of execution No. 3,402 from the District Court of *Galle*, until the question of preference or concurrence was decided."

"The value of a judgment, of the kind alleged in this letter, (supposing it in existence, and it has not been adduced, though that there is such a judgment cannot as a matter of fact be doubted,) considering, *firstly* the parties, *Moolary Mohidien Cutty Nacodah* on the one side, and the official Administrator, who following in his steps had thought fit to raise groundless plea upon groundless plea to the effect of further postponing the payment of this most just debt, on the other; *secondly* its date

(in January 1836,) the period when all the pleas thus vexatiously raised and abandoned were put forth; *thirdly* its evident object, to obtain indirectly what had in vain, time after time, been sought for directly for nineteen years, viz: the depriving this widow of her legacy; and finally considering the easy manner in which, so far as appears, this judgment was obtained, a manner strangely contrasting as it does with the obstacles thrown in the way of the Respondent, —can scarce be doubtful.

"Concert between two parties, for the purpose of causing an injury to a third, seldom if ever can be proved but by circumstantial evidence; therefore it is a well-established legal maxim that where evident marks of such concert or of such a design appear, the proceeding, whatever form it assumes, judicial or otherwise, shall with reference to the person whose interest it was the purpose to injure, be deemed invalid. On these grounds therefore, if on these only, the Court would have no hesitation as to the decree it should pronounce. But if defective in principle, the present proceeding is equally faulty in form. The sum of £54. 1. 1. is stated by the Administrator to have been assigned to defendant "as a dividend," and to have been deposited as such in the Colonial Treasury. From that time forward, it can only be considered as having been held by the Treasurer, as by any private Agent or Banker, for account of the party for whose benefit it had been paid. This has been met in argument by the assertion, that the Administrator had received notice of the present claim from the Appellant prior to his divesting himself of this money. Should such be the case, of which not a particle of proof is tendered, perhaps a remedy might exist against the Administrator,—it certainly does not againt any other person. Then though the law favours generally, as far as possible, an equal partition of assets among creditors, yet, before the Appellant could under any circumstances be allowed at this distant period to share in a dividend specially allotted to another, he must very

satisfactorily account for his past neglect, and shew that he had hitherto obtained nothing, as a dividend on his claim; which he has not done, or attempted to do.

"The Court is therefore of opinion that, viewed in every light, the present opposition to an action already *determined* by judgment in 1818, notwithstanding which the law-suit has been five times re-opened, and made to last upwards of *nineteen* years, (being double the duration of the siege of Troy,) is vexatious and groundless; and it would ill discharge its duty were it not to add, that, so long as a shadow of Justice is to be obtained in Ceylon, the proceedings on which it has been its principal duty to observe, neither can nor shall be repeated with impunity. The decree of the District Court is therefore affirmed with costs, among which costs (to be paid by the Appellant) is to be included interest at the current rate of 9 per cent. on the sum detained at the Treasury, viz: £54. 1*s.* 1*d.*, from the date of the opposition to the payment thereof,—16th May last to the day of its actual payment into the hands of Respondents."—No. 4,353, D. C. *Galle*, (J.)

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538. *Wattoeyagamegey* v. *Kirigelle-badahetle.*

Right of a party who asswedumizes another's land, with his assent.

This case had been referred back on the 26th July 1837, for evidence as to the share, if any, which an original asswedumizer by consent of the proprietor, but without any distinct stipulation of share, is by custom entitled to in Saffragam, in the land so asswedumized.

It now appeared that the Plaintiff, (the proprietor) had remonstrated when the Defendant (the asswedumizer) first attempted to assume possession, viz: above five years before the commencement of the action. The Supreme Court pronounced judgment as follows:—

"The question as to Plaintiff's consent was determined by the last decree of this Court, and though both parties now admit that the Plaintiff

remonstrated when the Defendant first attempted to assume possession, still was the present action only entered in 1836.

" The Court cannot but consider the tardiness in commencing the proceeding, as tantamount to an acquiescence in the improvements then going on ; so that the land having been asswedumized by the implied consent of the owner, though without any express stipulation of terms, the decree of the Court below (which is in favour of the Defendant) must be set aside, and in lieu thereof, it is decreed, in conformity with the custom as proved, that the piece of land in dispute be held in *ande* between Plaintiff and Defendant ; each party paying his own costs.

" It is perfectly clear that where there is no consent, express or implied, land asswedumized by a stranger, continues to belong exclusively to the original owner. On this point the testimony is unanimous, and conformable to sound principles ; but here, the Court, as stated, cannot but *imply* a consent from the conduct of the Plaintiff himself."—No. 1,383, D. C. *Ratnapoora*, (J)

October 25, (R. St.)

539.—*Ramal Ettena* v. *Neket Ralle.*

The S. Court will decide on all interlocutory orders, without the assent of parties, and also in criminal appeals.

The Supreme Court will decide upon all interlocutory orders of District Courts, without reference to the assent of parties ; Groenew *egen de Leg. Abrog.*—Dig. xlii. i. 14. ; and also in criminal cases of appeal. No. 8,644, D. C. *Kandy* (R.)

October 28. (R.)

At Chambers.

540.—In re *William Fernando.*

Injunction issued by the Supreme C. to prevent waste.

Upon certain Affidavits sworn by six persons, Mr. Henry *Staples*, Proctor, appeared on their behalf, and moved for a writ of Injunction, accompanied by an order directed to the Agent of Government of the Western Province, his Assistant or Assistants, and to all persons concerned ; directing him, and each of them, to refrain

from committing further wrong to the property referred to in the said Affidavits; and to replace the fences where they stood.

And it was ordered accordingly. In re *William Fernando* and others. (R.)

December 4. (R.)

At Chambers.

541.—In re *W. Don. Jeronis.*

Injunction issued by the Supreme C. to prevent the delivery of a conveyance by the Fiscal.

Upon an Affidavit sworn to by *W. Don Jeronis Appoo*, Mr. Henry Staples appeared on his behalf, and moved for a Writ of Injunction directed to the Fiscal of the Western Province, &c., directing him to refrain from delivering any transfer, or giving possession of a certain house and garden belonging to the Deponent, and sold by the said Fiscal by virtue of a certain Writ of Execution against him and his mother *Jantrigey Dona Anna Maria.*

And it was ordered accordingly. In re *W. Don Jeronis.* (R.)

December 20. (J. St.)

542.—*Mahawelletenne* v. *W. Meduma Banda.*

Kandian law —A Grandmother's interest in the Estate of the Grandson.

This case had been referred back to the Court below for the purposes mentioned in the decree of the 26th July 1837. (See *ante* p 183.) Nothing new, however, having been elicited by the further proceedings, the Supreme Court proceeded to a decision between the original parties to the suit.

Jeremie, J.—The question raised is purely one of law. What interest does a Grandmother, when called to the inheritance, take in the estate of her Grandson, by established custom in *Saffragam*,—a permanent, or a life-interest? It has been matter of controversy, since the acquisition of the Kandian territory, whether the mother took a life or permanent interest. Throughout the other provinces of that kingdom, there is no doubt that she only takes a life-interest; but in *Saffragam*, the preponderance of authority and precedent, is clearly in favour of an exception; and the right of the mother to a permanent es-

tate, seems now too well-established to be disputed : indeed, on this point, the District Judge concurs with the Supreme Court.

A distinction has, however, been drawn in the decree appealed from, between the interest which the mother would avowdly have possessed, and and that which belongs under similar circumstance to the Grandmother. This, however, appears to the Supreme Court on the fullest inquiry and investigation, to be untenable. Even that portion of the testimony in this cause which affirms the mother's right to a life-interest only, makes no kind of difference between mother and grandmother, when the inheritance devolves on the latter.

And this seems the rule throughout the Kandian Provinces, where, when the mother has a life-interest, so has the Grandmother, when she alone survives ; and when the one takes a permanent interest, so does the other : nor does there seem sufficient authority for disturbing this well-established analogy. The decree of the Court below is therefore reversed, and the lands claimed by the plaintiff adjudged to him. No 940, D. C. *Ratnapoora.* (J.)

543.—*Edire Appowa* v. *Gabriel Perera.*

The S. C. will not alter a judgment, where the party aggrieved thereby has not appealed.

The Supreme Court had by a previous decree of the 10th March 1837, required the defendant to account for seven leaguers of arrack, considering it already proved by the defendant's admission to the witnesses, that that quantity had been distilled. On the subsequent hearing, however, the defendant failed to account for them ; and the Court below gave judgment for the Plaintiff, but only for his share of *five* leaguers. Against this judgment the defendant appealed.

Held by the Supreme Court that the defendants ought to have been adjudged to pay the plaintiffs share of the whole *seven* leaguers, and not of *five* only, as now adjudged. The plaintiff, however, not having appealed against that judgment, the Supreme Court refused to award in

his favour his share of the value of the two remaining leagures. But the defendants appeal was dismissed, of course, and the judgment of the Court below *affirmed.* No. 1,083. D. C. *Amblangodde.* (J.)

December 21. (R.)

At Chambers.

544.—In re *H. C. Bird.*

On reading a letter of the District Judge of Kandy, and an Affidavit sworn to by Lieutenant *Henry Charles Bird*, the Supreme Court granted an Injunction against certain parties named in the Affidavit, to desist from removing the crop of paddy from the Estate of the said *Henry Charles Bird*, situated at Gampola. In re *H. C. Bird.* (R.)

Injunction issued by the Supreme C. to restrain the removal of crops.

December 28. (J. St.)

545.—*W. Seddo* v. L. Sitta.

It is the established practice in this Island to consider costs as a joint and several debt, which may be levied from either of the parties at the creditor's option; the debtors being left to their remedy against each other for reimbursement of the shares overpaid. No. 1,676, D. C. *Amblangodde,* (J.)

Costs decreed against several defendants are a joint and several debt.

December 30. (J.)

546.—The *King* v. *Asselegey Donjey.*

The question in this case is whether the same person, being both District Judge and Custom-Master, can prosecute a suit in his latter capacity before himself in the former? Or, is this not an infringment of the 24th Clause of the Charter?

"The Court is of opinion that the Charter has been infringed. The decree of the Court below is therefore reversed, together with the proceedings dating from the first summons; and the prosecution is to be entered before the D. C. of Caltura."—No. 1., D. C. *Amblangodde.* (J.)

A person who is both Custom Master and District Judge, cannot prosecute a suit in the former capacity before himself in the latter.

January 3, 1838. (R. J. St.)

547.—*Tantrigey* v. *Ganhewayey.*

1. A mortgage granted in 1823 before a schoolmaster and witnesses is valid.

2. A mortgage, accompanied with possession of the title deeds, is entitled to preference over a subsequent mortgage by mere contract.

In this case.—JEREMIE J. delivered the judgment of the Court, as follows :

"This is a question of concurrence. The same estate is mortgaged to two persons. The date of the plaintiff's deed is the 23rd August, 1822; that of the defendant's is the 27th January, 1823. The question is, which has the preference? If both deeds were of precisely the same nature, there could be no doubt upon the subject. But the defendant submits that his mortgage is *special*, the plaintiff's *general.* This is an error of fact: they are both special. He adds also that his deed is drawn by a Notary; the plaintiff's by a schoolmaster and witnesses; and that his mortgage is accompanied by the transfer of possession of the title-deeds, which the plaintiff's is not. On these two points the judge on circuit required the collective judgment of the Supreme Court.

"And that Court is unanimously of opinion, that, at the time both deeds were passed, they were, and therefore they are, still equally authentic in point of form. But that by the universal and long-established practice of this Island, a mortgage with transfer of possession of the title deeds of the land mortgaged, is, though more recent in date, to be preferred to a mortgage by mere contract. On this ground therefore the decree of the Court below is reversed, and the plaintiff's action dismissed, but without costs.

3. A party who under proceedings of Court, but without notice to a claiment, sells an Estate, after having opposed a previous sale by the claimant un-

"The District Court has noticed in terms of proper reprehension the circumstance of the defendant having, without notice to the plaintiff, sold the estate under proceedings at Matura, though he had himself previously opposed the sale by the plaintiff under proceedings at Galle. There can be no doubt that this was a contempt of the authority of the latter Court, for which he might have been attached by

it, and punished by fine or imprisonment. The present proceedings are, however, purely of a Civil nature.—No. 3,435, D. C. *Galle*, (Coll.)

der proceedings of another Court, is guilty of contempt of the latter Court.

548.—*The King* v. *Bodiabadoegey.*

A Govt. Renter, who had by the conditions deprived himself of all right to remission of rent, except for losses from unforeseen calamities, is not entitled to a remission on account of losses arising from the Govt. having established a Small Pox quarantine during a portion of the term.

This was an action on the part of Government against the purchasers of the Fish-rent at *Colombo*, for the period from 1st April to 31st December 1833. The defendant claimed a deduction from the rent, "owing to the Government having established a quarantine on account of the prevalence of the Small-pox," which had caused an interruption of the Fishery. To this it was objected that the defendants had, by an article in the conditions of sale, deprived themselves of all right to the remission claimed by them. The article in question was as follows: "*The renter shall have no claim to a remission of his rent upon the plea of losses and deficiencies, except in cases of unforeseen and unavoidable calamities, of which Government alone will be the sole judge. And no claim for remission, which is not preferred to the collector, immediately on the occurrence of the event which gives rise to the claim, shall be deemed admissible, nor be entitled to the subsequent consideration of Government with that view, unless preferred within three months after the expiration of the rent.*"

The Court below having given judgment for the defendant, the case came in appeal before the Chief Justice on Circuit, and it was reserved for the opinion of the Collective Court, and the judgment of the Court was this day delivered as follows:

"The defendant argues, that quarantine being an act of the Government, the latter is responsible for his own acts, notwithstanding the above condition, which merely applies to losses caused directly and immediately by an unforseen calamity, or by an event perfectly independent of the consent of the parties. There can be no doubt that covenants of this kind which place one contracting party entirely at the discretion of the other, are at all times to be viewed with

jealousy by Courts of Justice. Had therefore the Act of Government in the present case, been unwarranted by the emergency, or highly unreasonable, or such as could not have been fairly anticipated under the circumstances, the *Senior Puisne Justice* is of opinion that the defendant's claim should have gone to proof. But it is admitted not to have been so. It is true the interruption arose directly from the quarantine; but this quarantine was a measure expressly provided by Law to stop the progress of a calamity which had already occurred. The calamity is therefore the sole original cause of the interruption; for, had there been no calamity, there had been no interruption; nor can it have been in the contemplation of either party on entering into the original engagement, that the Government should be fettered in the fair exercise of its discretion, with regard to the measures it might feel it its duty to adopt, in warding off a public calamity of this nature.

"It is therefore now decreed that the said order be set aside, and as this was the only question in the case, it is further decreed that defendant do pay the plaintiff the sum of £702 19s. 9d., with interest at the rate of 9 per cent. per annum from the 22nd day of February 1837, being the sum claimed in plaintiff's replication, bearing date the 15th April 1837, without costs."—No. 101, D. C. *Colombo*, S. (*J.*)*

January 6. (R. J. St.)

Tottegodegamegey v. *Bolagamegey*.

549.—*Menickoegey* v. *Gonapinowalatantrigey*.

The judgment of the Court was delivered by *Jeremie* (J.)

1. The defendant, after publication of banns with the plaintiff, had

"These two cases bearing directly upon the same subject, the Native Marriage Law, are taken and determined together, though not otherwise connected.

* An appeal was taken against this decision, to the Queen in Privy Council. (See order of the 17th January, 1838, Civ. Min. 55); but subsequently abandoned (Ibid. p. 196.)

"In one of them, No. 2,855, the banns of marriage between the 2nd plaintiff and the 1st defendant having been duly published at her residence, the 1st defendant conducted her to his village, but refrained from announcing the banns there; and several months after, he returned her to her parents, having, as the libel alleges, treated her with great cruelty. This latter fact he denies, admitting however that he had inflicted some trifling corrections to amend her conduct." The action now entered is to get the banns which had taken place cancelled, and to recover £9 17s. 9d., with costs, for advances made by the 1st plaintiff, the father of the 2nd. Defendant, whilst he admits that he obtained some property from 1st plaintiff, avers that the suit is not maintainable, as he is willing to "complete the marriage ceremony," and as the parties "have lived as man and wife for more than one year." The D. C. having heard some of the plaintiff's witnesses, and pronounced it needless to hear testimony as to the ill-treatment, has dismissed the claim; on the ground that the plaintiffs "have failed to support it." This, on a question partly of Law, and partly of fact, especially when the facts are already tolerably established by defendant's admission, is conclusive. That the marriage is incomplete and consequently void, is admitted by all parties, though the marriage would have been complete according to ancient custom, by the "conducting" alone, and that the inconvenience now felt arises from the adoption of forms equally complicated and foreign to the habits of native inhabitants, is also beyond question.

conducted her to his village, but subsequently after treating her with cruelty, returned her to her parents. In an action by the plaintiff and her father, to get the banns cancelled, and to recover certain advances, *held* that the deft's. plea, that "he was willing to complete the marriage," and that "they had lived as man and wife," was not an answer to the action.

The Court has therefore to inquire as follows: In point of *Law*, is the defendant's reply, that he is willing to complete the ceremony, or that the parties have lived as man and wife for a year, a sufficient bar to the action. The proposal to publish the remaining banns, and thus complete the marriage, if made

within a reasonable time, and before he had himself broken off the engagement, by delivering her back to her parents, would no doubt be sufficient. But under the present circumstances, it is the collective opinion of the Supreme Court that it is not so; and as to the time they have lived together in this case, it is merely an aggravation of the defendant's misconduct. In point of *fact*, have plaintiffs made out a *prima facie* case, taking together the evidence and admissions? The Court is of opinion that they have: for, as regards the ill-treatment, if proof of this were necessary, it conceives that the single fact of the 1st defendant having taken his intended bride to his own house, and there instead of making her his wife by proclamation of banns (which depended on himself,) having kept her for a considerable time in an equivocal and degrading position, is as gross an instance of ill-treatment as can well be conceived, setting aside his admission as to his occasional corrections. And as to the amount advanced, the defendant's conduct would probably have warranted an action for damages independently of any advance; but taking the present proceeding as it stands, it is seldom that on occasions of this kind, the exact amount can be ascertained with precision: it must therefore rest with the Court, if no additional light is thrown on the facts by the further evidence, to affix a reasonable sum for the advances, taking into consideration the station and condition of the parties and the manners and customs of this portion of the population.

In case 3,036, the banns were duly proclaimed and registered, subsequently to which, the plaintiff alleges that the 1st defendant, instead of allowing the 2nd defendant, his daughter, to be "conducted" to the plaintiff's, transferred her to another person, the 3rd defendant, who took her to his house, where he states they have since lived as man and wife, and where, he adds, she was recently delivered of a child. These

facts are denied by the defendants, the former of whom offers *now* to conduct his daughter to the plaintiff's.

On the proof, the Court is of opinion that a *prima facie* case has been made out by the plaintiff. He has, it conceives, satisfactorily shewn, that the 2nd defendant has cohabited with the third, by consent of the first. But now arises the question on which the collective judgment of the Supreme Court was principally required, viz.: Is the marriage in this case complete?

The Reg. No. 8 of 1822 does not render the presence of the parties necessary to the validity of the Registration. Unless therefore the consent of both parties is duly recorded, the Court will require strict evidence of subsequent cohabitation.

It is a circumstance worthy of notice, that the Regulation regarding native marriages No. 9. of 1822, requires, in no part of it, as a condition essential to the validity of a marriage, that the consent of parties shall be recorded by any functionary, civil or religious; or that they shall appear *together*, or singly, before any such officer. The two sole conditions of that Law are a publication or licence with registration of banns, and subsequent cohabitation; but even for the purpose of making proclamation and registration, it is not incumbent on the officer to insist on the appearance of both or either of the parties,—he is to proceed "when applied to";—so that it is not only possible to go through these formalities without the consent or even knowledge of the parties, but bearing in mind the very tender age at which females are often affianced in this country—on which occasions the banns are frequently proclaimed,—it is probable, with regard to them, that this will occur.

The sole evidence of consent being therefore "subsequent cohabitation," it follows that the proof on this point must be more conclusive than might otherwise be required, for if the previous consent of both parties were duly recorded, a Court would presume cohabitation, except in very extraordinary cases. Now, however, subsequent residence together, or the "conducting" the bride according to custom, or the proofs of familiarity admitted in matters of this nature,

must be insisted on; and to infer a marriage from the mere fact of occasional visits having been paid by the intended husband at the bride's father, though after publication of banns, is more than the Court would feel inclined to do. But in the present case, the plaintiff originally claimed the 2nd defendant "as his wife;" and the defendants in corroboration state, that during 1st defendant's absence at sea, the plaintiff and she lived together as man and wife at 1st defendant's, which (as a fact) is in no way contradicted by the plaintiff: it follows therefore that the marriage is complete, however inclined the plaintiff may have subsequently felt to dispute it.

There is nothing to prevent a parent becoming a party to the marriage-contract of his child, though of full age; and in rendering himself responsible *in solidum* with the child, for the performance of the contract.

But after marriage, the remedy of the husband, in case of seduction, (even with the parent's consent,) is only against the seducer.

Such being the relative position of the parties, other questions arise as to the *form* and mode in which these actions have been entered. In the first action, 2,855, the father and daughter proceed against the father and son, which in other countries would be irregular; for either the intended bride and bridegroom are of full age or they are minors; in the former case they should proceed alone, in the latter the parents only appear in a civil action, as guardians for them; but in none is it necessary to unite them in this shape. It appears however to have been universal in this Island, under every system of law that obtains here, to introduce the parents on these occasions, and to render them responsible *in solidum* with the children, whatever their age, to marriage engagements entered into, though verbally, with their consent: and as there is nothing unreasonable or contrary to an express Law in this usage, the Court does not feel inclined to disturb it.

The case 3,036 is, however, decidedly irregular; either the plaintiff was, or he was not married. If married, as he is shewn to have been, he could have no remedy against the first defendant; since, as the father of the second, he had fulfilled his engagement: nor against his wife for an indemnification in damages. His sole remedy is therefore against the third defendant,

And this objection as regards the two first defendants is essential, and cannot be overlooked. There is another irregularity in the plaintiffs claiming specific, instead of general, damages. The purpose of the action being however obvious, and the parties having gone to proof, and 3rd defendant never having made the objection, which is purely of form, the Court considers it now too late to take further notice of it. The District Court, however, will do well to notify to the professional gentlemen engaged, that, should irregularities of this nature again occur, it is not impossible that they may be refused their costs.

For the reasons above stated, the decree in 2,855 is set aside; and the Court below is to proceed to receive the plaintiff's further evidence. The costs to stand over.

In case 3,036, as regards the 1st and 2nd defendants, the decree is affirmed; with reference to the 3rd, it is set aside; and the Court below is to proceed to hear this defendant's evidence. The costs, with regard to third defendant, are also to stand over. When the evidence in both or either of these cases is complete, the District Court will proceed to pronounce its opinion on the proofs, and then transmit the papers to the Supreme Court for its final adjudication.

On the whole, the two cases shew forcibly the defective state of the Native Marriage Law, which not only requires no official evidence of consent, but sets aside the universal principle that the *consensus*, and not the *concubitus*, *facit nuptias*; and is also evidently opposed from the complication of its forms to the habits and usages of the native population. (No. 2,855. 3,035. D. C. *Galle* (J.)

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504. *Mohamadoe* v. *Veliappen Chetty*.

Judgment of Rough, C. J. in No. 81, D. C. *Manaar*. See marg. notes, p. 137.

In this case, which was reported *ante* p. 137, the Chief Justice now delivered his judgment.

"When this case (which now comes before

us in review) was heard last (February 13th 1837), I was unavoidably absent, being compelled immediately to leave Colombo for the Circuit. It was then however agreed, that the notes of the presiding Judge, should be taken as evidence of what passed in the Supreme Court, and that my learned colleagues, if they saw fit, should advise with me on any point which might arise on argument, pending their sitting. But although they did not find it necessary so to do, still I am persuaded they would think me blameable, as I should also hold myself to be blameable, if now, upon this hearing in Review, I did not, should I have occasion to differ from them, either on the whole, or in any particular, at once freely state that difference, giving my reason for such difference. I have therefore felt it my duty to read carefully through the pages of these proceedings and the elaborate judgment given in the case on the 1st March. I have also attended to the argument urged this day; but I discover no cause for in any respect dissenting from the judgment which has been given. I express my concurrence in it, and my satisfaction with it.

The *King's Advocate* in behalf of defendants and appellants, Mr. *Morgan* for plaintiff and respondent, are heard. They go over the legal and technical grounds already discussed in the decree of the Supreme Court.

But this Court sees no reason to alter its opinion with regard to them; the more so, that objections as to the form and wording of the exhibits, whether well or ill-founded according to English practice, should not be made to apply in strictness to agreements entered into in a remote district in India, which should be interpreted on broad principles of equity. As regards the objection, for instance, that the exhibit A contains the words "should you," or "if you should," instead of the more strict terms commonly in use in covenants in England, much may depend on the translation, more on the idiom:

it is sufficient that the conditions were perfectly understood, and *in part executed* by the parties themselves, specially as these conditions were renewed on the morning of the 10th February, as shewn by the receipts and olah of that date; and that the exhibit A is only of importance as explanatory of the engagement then again renewed, confirmed, and ratified.

It has not been disputed that *Ramen Chetty* named in the receipt, is the *Ramenaden Chetty* of the evidence, or that the *Merapen Chetty* of the evidence is the *Meyappa Chetty* of the receipt; nor, indeed, with persons acquainted with the usage among the native population, could there be a doubt on the subject. Objection has also been made to the amount of the damages, and it has been stated that the Court in assessing damages referred to the evidence taken *ex parte*, but not without notice, in the Court below. This is an error. Amidst many conflicting statements as to the value of the Fishery, this Court was principally guided by the testimony of two trust-worthy public servants, the District Judge, Mr *Huskisson*, and the Treasury clerk Mr. *Alwis*; and it gave full credence to Mr. *Huskisson's* opinion (though he referred to the evidence of the renter *Mootoosawmy* as taken before him,) from the conviction that Mr. *Huskisson* (the Government Agent of the District, as well as District Judge) would not have referred to it, had he not known it to be not inconsistent with truth. Nor is there any reason why the Supreme Court should not refer to this evidence, which was duly taken before the District Judge, and is regularly filed in the cause. It has heard *Mootoosawmy* anew for its own satisfaction, and to give the defendants an opportunity to cross-examine him; but it does not follow that it was not at liberty to compare his present with his past evidence *in the same cause*, though it has not done so.

The decree of the Supreme Court is therefore unanimously confirmed by the three Judges in Review. [No. 84, D. C. *Manaar*, (R.)

Jan. 10, J. St.

505. *Mirando* v. *Rodrigo.*

[The following order, made in the case No. 1,517. D. C. *Negombo,* directing an examination of the parties before the Supreme Court on circuit, is inserted here as a precedent.]

Form of an Order for the examination of Witnesses before the Supreme Court.

Whereas this case is now in appeal from the before mentioned District Court of *Negombo* ; and whereas certain proceedings have since the date of the order of the Court below been instituted and had ; and whereas it is considered and resolved by this our Supreme Court of the Island of Ceylon that it will be expedient and fitting that the parties and witnesses in this case shall be severally summoned for examination, personally and publicly before the Supreme Court.

This Mandament is addressed to *C. P. Layard,* Esquire, District Judge of Negombo, as well as to *E. S. Waring,* Esquire, our Fiscal of the Western Province, to the parties in this said appeal, to the witnesses severally heard and examined before our said District Judge herein, and all others whom it may concern ; and it is hereupon directed and ordered that the said *C. P. Layard,* Esquire, Judge of the District Court of Negombo, as aforesaid, shall give or cause to be given to the said parties herein litigant, due and distinct notice, that their case is fixed and appointed for hearing before our Supreme Court, on Wednesday next, the twenty-fourth instant, at eleven in the forenoon, and their attendance is commanded at the Court-house, *Hulfsdorp,* at that day and hour.

And it is further directed and ordered, that the said *E. S. Waring,* Esquire, our Fiscal of the Western Province, shall hereupon give or cause to be given due and distinct notice to the witnesses in the said case now of appeal, of these the premises above mentioned, and that he do

issue or cause to be issued summonses to the said witnesses, alike of appellant as of respondent, and do require their attendance at the time and place as aforesaid, on pain of the usual penalties.

Witnesses on the part of the plaintiff, A. B.

Witnesses on the part of the defendant, C. D.

[No. 1,517, D. C. *Negombo*. (St.)

Jan. 13. (J.)

552.—*Vidanelagey* v. *Isboe Lebbe*.

On a Petition of Appeal, in which the appellant complained of the conduct of his Proctor, *Held* that he had his remedy against his Proctor.

In this case, the Court below had refused the plaintiff a postponement; and in his Petition of Appeal against this order, the plaintiff made several allegations against the Proctor who had the management of his case.

JEREMIE J.—If the facts alleged in the Petition of Appeal be true, the Appellant has his remedy against his late Proctor; and if not, this gentleman has a right of action against him for gross defamation; but there can be no doubt that in the present case the Court exercised a sound discretion in refusing a further postponement. [No. 3,057. D. C. *Caltura*, (J.)

January 25. (J.)

553.—*Dissenaike* v. *Hettchewagey*.

Where the real party entitled to the property in dispute, puts forward others as claimants, in order to get himself called as a witness, he may be punished sum-

In this case, the Court, reversing the decree of the Court below, which was against the plaintiff, pronounced judgment as follows:

There is reason to apprehend that it is not an unusual practice in some of the districts for the real parties—persons of some substance—to put forward others, as claimants, and then to get themselves called as witnesses in support of their own case: this is the third instance, at *least*, of the kind within the Court's short experience. On such occasions, should they fail, their adversary is left with a very insufficient remedy for

marily as for contempt of Court.

the costs, the nominal parties possessing little, if any, property ; and when they succeed, as they had at first, in this and the two other instances to which the Court more expressly alludes, they of course swear themselves into the estate in dispute.

It cannot therefore be too generally known that such a proceeding is nothing more or less than a gross fraud and contempt of the authority of the Court, punishable summarily, independently of other consequences of fine and imprisonment. A more evident instance of the mischievous consequences of this practice than the present case furnishes, could scarcely occur. *A. L. H. Lebbe*, when called upon to defend his title in his own person, says, "I can have no claim to any part or portion of the land plaintiff now claims, and I have no evidence to adduce"; he also explains that "his trees do not stand within the portion of the garden included in plaintiff's surveys,"—whilst, when called as a witness for the original Intervenients, he distinctly made oath as follows:—"I enjoyed the produce of *half* the *number of trees* in the said garden in right of purchase from *Lokoo*, until four years ago, when *Comister Aratchigey Dines* dispossessed me of the said trees, asserting that they belonged to plaintiff, and that plaintiff had authorized him to take charge of them." He then proceeded to state that he had been deprived of an additional *fourth*, which he purchased from one *Simey*, by plaintiff in the same manner, adding that the remaining fourth belonged to one *Babey Vidahn*; and he thus accounted for the whole garden by giving to one Babey the *fourth* of which he now admits he himself possesses the principal share, and claiming exactly the *three fourths* (formed into a new garden,) which belong to plaintiff as ground-owner, and first defendant as last planter. Under these circumstances, the Court cannot do less than charge him with the

costs incurred by all the parties to this suit, nor can it refrain from announcing its determination to visit with much greater severity any reiteration of this offence. Indeed had not his deposition been already discarded, as proceeding from an *interested* witness (though it remains on record) it would have been the Court's duty to have directed even now a prosecution in another shape.

It is therefore further decreed, that the whole of the costs incurred by plaintiffs, by the several defendants and the remaining intervenients, shall be borne by A. L. H. Lebbe Conicapulle, the last-called Intervenient.

[No. 251, D. C. *Tangalle*, (J.)

February 7. (J. St.)

554. *Toopahigay Anthony* v. *Dona Christina.*

On a doubtful clause of a Will, where the parties have for several years put their own construction on it, the Court will not disturb it.

The plaintiff in this case claimed, amongst other things, certain nets left to him by the will of *Daniel Quejo*, the husband of the defendant, but which the defendant refused to deliver to the plaintiff. It was contended on the part of the defendant that she was justified under the terms of the Will, in retaining possession of the nets.

The Court below having non-suited the plaintiff; *On appeal, per* Jeremie, J.—This case turns upon the construction to be put on the clause of the Will respecting the nets,—which might be doubtful, had not the parties put their own construction, for several years; which, being reasonable in itself, the Court now sees no reason to disturb. The Respondent is therefore to continue to retain the nets as she has invariably done since the death of the deceased, together with the proceeds of the net she has sold.

[No. 13,763, D. C. *Colombo*, N. (J.)

February 15, *(R. J. St.)*

556.—*Silva* v. *Felsinger.*

Where in an action for use

The plaintiff in this case having let a House, which he values at Rds. 1500, to defendant,

and occupation, the plaintiff filed an application stating that the defendant had sub-let the property to another party, and that they were doing injury to the house, and praying that they be ejected therefrom; the Supreme Court directed that the case should be heard and decided forthwith.

commenced on the 9th December las, an action against the latter for £3. 5s., amount of four months' rent then due, and £3 more for damages sustained by breaking down the Walls, &c. The case was fixed for hearing for May next. In the meantine the plaintiff filed, on the 16th December, a further application, stating that defendant instead of personally occupying the house, had allowed his brother-in-law *Mr. Lovendahn,* to to take possession; that he had received rent from neither, and that they were doing further injury to the house and garden; and he therefore prayed that the said occupant should be ejected therefrom, on which the District Judge determined as follows;

"On reading the application of the plaintiff, it is decided that it be refused, because whatever damage the plaintiff may sustain, he will be entitled to recover from the defendant, if he proves his case against him."

This order was appealed from; and the *Senior Puisne Justice* having considered the case, directed on the 7th February that it should be heard collectively; and the Court in collective sitting is now unanimously of opinion that the above order be set aside, and that the District Court do forthwith proceed to hear witnesses in presence of the parties, and to determine the case on its merits, reserving to either party the right of appeal. The Court is also of opinion that a rule of Court is requisite for the purpose of establishing a summary form of process, to be adopted in cases, which like the present, are of undoubted urgency.

[No. 5,063, D. C. *Seven Korles,* (J.)

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559. *Parlett* v. *Pettachy Chetty.*

1. The defendants having, on an advance of £250, agreed to supply the plaintiff, within 3 months

The principal question in this case arises from a claim of damages for a breach of covenant.

By Agreement dated 22nd September 1836, defendants undertook to deliver to plaintiff 250 cwts. of coffee of good and approved quality;

perfectly dried and picked, fit in all respects for shipment, and to the satisfaction of plaintiffs, at the rate of £2. per cwt. of 112 lbs. English. They received an advance of £250 and agreed to fulfil their engagement within three months, on a penalty of £200 over and above the repayment of the £250. On the 9th November, the parties entered into an additional agreement by which the defendant agreed to "deliver to plaintiffs within 21 days, 500 bags, containing each 4 parrahs of good and merchantable coffee, picked and perfectly dried, and free from black and white beans, and entirely to the satisfaction of the plaintiffs, at the price of £2. 3s., per cwt. of 112 lbs English. In part payment they received an advance of £360. There is no penalty stated in this latter agreement. Towards the acquittance of their undertaking, the defendants made four deliveries, for the three first of which receipts were given at the time. But they admit that they have not entirely fulfilled their engagement, and the plaintiff claims damages to the full amount of the penalty, in consequence. The defendants reply, that the fault lay not with them, but with the plaintiffs, who refused to pay them the balance upon what they had actually delivered, and who made very unnecessary and frivolous objections to the coffee actually delivered.

The Court is of opinion that damages are due, but not to the amount of the penalty.

"Damages are due." The defendant was only entitled to payment at the close of the periods stipulated for the several deliveries; or, with so heavy an advance, at the close of the contract; and as to the objections made by the plaintiffs, they might at least have tendered; and had the article so tendered been in every other respect conformable to their engagement, it is not the insertion of the words "to the entire satisfaction of the plaintiffs," that would have deprived the defendants of their remedy. Such stipulations are always very incautious; but yet a party entering into them must be understood

with 250 cwt. of Coffee at £2, a cwt. *Held* that they were not entitled to payment of the balance till the close of the period, &could not refuse to deliver the Coffee on the ground of nonpayment.

2. An agreement to deliver Coffee "fit for shipment, and to the satisfaction of the plaintiffs, "is fulfilled by the delivery of the best kind of Coffee obtainable at about the stipulated rate in the market.

3 The plaintiff, though he objected to the quality of the Coffee delivered, refused to allow the defendants to remove it: *Held* that he had thereby elected to receive it in performance of the contract.

4. The measure of damages in case of non-performance of such an agreement is the probable loss sustained by the plantiff; and not the amount of the stipulated penalty.

5. The distinction between *penalty*

and *liquidated damages* is peculiar to the Law of England.

to have rendered himself dependent upon the judgment, and not the mere pleasure or the caprice of the other contracting party. They shew that he has stipulated to deliver the best kind of merchandize obtainable at about that rate in the market, at the time of the contract; and if he offers goods of that description, he is to be considered as having fulfilled his engagement, though the goods be refused: for it can never be too strongly impressed on the minds of parties, that in all, and more especially mercantile, contracts, the most perfect good faith is expected from all sides, and will be insisted upon. A breach of contract therefore can never be excused, except on the most satisfactory grounds; the more so, when, as in this case, the party, owing to a considerable rise in the market price of the article, had a direct pecuniary interest in infringing his contract; but on the other hand, provided it be executed in good faith, no mere form of words will prevent the Court's looking to the meaning and obvious intention of the parties when they entered into the engagement.

" The full penalty is not due." On this point again, the same good faith enjoins that the measure of damages should be the probable loss. Penalties therefore which exceed that amount are reducible, whilst to that extent damages are equally due, though there should be no stipulated penalty. It is true that in England the full amount of a stipulated penalty has been occasionally recovered as liquidated damages; but this is peculiar to the law of England. It does not obtain here, *(See Censura Forensis* and *Vander Linden)*; and even in England a penalty is hardly, if ever, recoverable, except it be expressly stipulated " as liquidated damages," and even when so expressly stipulated, it is but rarely allowed; the equity of the case overruling almost invariably the positive terms of the agreement, as it has in another country the plain meaning of the text of its recent celebrated Code. A penalty in an agreement

is therefore nothing more or less than an estimate of probable loss, stipulated at the time of making the contract as a criterion of the risk, but subject to be re-considered on either side, when the loss has actually occurred. And this Court has already so ruled in a case between the same plaintiffs and another party, in January 1837, and it sees no reason to alter its opinion.

The Court has now to consider the amount of the damages. But, the parties are at issue as to the quantity of merchandize delivered.

This difference principally arises from the condition in which the Coffee was offered; the plaintiffs having, as they state, been obliged to dry, re-pick, and re-sort it, which occasioned a defalcation in the quantity. It appears by the receipts that of the three first deliveries, the first was accepted conditionally, the two last unconditionally,—the first receipt containing the following note, which is omitted in the two others,—" This must be dried again." The Court is therefore of opinion that the plaintiff's estimate ought to be taken for the first; the defendants, as stated in the receipts, for the two others. There remains the fourth, for which there is no receipt. Respecting this delivery, *Mr. Lambe,* a witness called by the plaintiffs, states,—" The last delivery was the worst of all, it was wet and hot. It was objected to, as not according to contract. Defendant complained of the loss he sustained on the contract, and pressed us to receive it, as it then was. I refused to weigh it, as it was so wet and would lose about 20 to 25 per cent. Defendant then proposed to take it away, but we refused to allow that, as he had large advances of money, and we required the Coffee, as a vessel, the '*Duchess of Clarence,*' was then in the roads. The vessel was consigned to us." From this deposition it is clear that the Coffee, instead of being declined was accepted; since, though the defendant offered to take it back, the plaintiffs, from motives of convenience to themselves, refused to return it. In

so doing they have made this delivery their own, for it remained with them to consider at the time, whether they would reject the Coffee and sue for the breach of covenant, or take the Coffee and carry it into account. They made their election in favour of the Coffee, and are now bound to carry it into account,—of course, at the rate at which it was tendered, and must be considered as having been accepted. The more so, that it is questionable whether they were not at the time debtors instead of creditors of the defendants ; and that, whether so or not, there was nothing to induce them to believe that the defendants were less solvent then, than when they made the whole advance. The three last deliveries must therefore be calculated at the rate set upon them by the defendant,—the first, by the plaintiff.

Defendants have consequently delivered,

First delivery... ...	Cwt.	189	3	26
Second do.	,,	191	1	10
Third do.	,,	116	3	25
Fourth do.	,,	126	0	0
		624	1	5

But to establish the deficiency it is requisite to ascertain the quantity in cwt. stipulated for by the second agreement, on which the point the parties are at issue. The loss to be principally considered will then be, the difference in the market price of coffee at the time when these engagements were entered into, and when they should have been fulfilled. But on this also the Court is not satisfied with the evidence. Its final decision is therefore postponed for the purpose of enabling the Court to receive further evidence, prior to its assessing the damages and definitely settling this account.

[No. 16,230, D. C. *Colombo* S. (Coll.)*

* See *Infra*.

March 1, (R. J. St.)

557.—*Nagel* v. *Corteling.*

Ebell and others, Intervenients.

[This case is fully reported *ante,* p. 107. It came up in appeal upon the subsequent proceedings, which had been directed at the previous hearing on the 7th Decr. 1836; and the following order was made thereon :]

The Supreme Court having taken into its consideration, in collective sitting, the further proceeding in this cause, together with a petition from the plaintiff; filed on the 15th Feb. last, is of opinion, that, as there can be no doubt the said plaintiff had a personal and direct interest in discharging the debt due to *Gilbert* by the late *Thomas Nagel,* and that she has used due diligence for the purpose of obtaining a cession of action from the said *Gilbert,* as required by this Court's former decree, the case be referred back to the District Court, with directions, that, if it shall appear to that Court that the said debt was discharged by plaintiff by any other means than from funds belonging to the Estate of the said *Thomas Nagel,* she is to be taken and deemed subrogated in all the rights of the said *Gilbert* against the Estate of the said *Nagel,* as fully as though she had obtained a cession of action at the time she made the payment.—[No. 3,193, D. C. *Jaffna* (J.)

A Co-obligor having, pending his action for contribution, obtained a cession of action from the creditor, held entitled to the rights of the creditor, on proving the due payment of the debt.

558.—*Malemiar Tamby* v. *Abdul Cader.*

This is a plea to the jurisdiction on the part of Intervenient. The plaintiff's reply is, that he comes too late, because the 1st Intervenient only appeared *after* the witnesses had been heard between the plaintiffs and defendants. To this opinion the Court would attach no importance, the intervenients being evidently the right party,—the only one that should have been sued as defendant.

1. A Plea to the Jurisdiction, if founded on the residence of the deft. or the place of the cause of action, must be pleaded before discussing the merits.

2. An intervenient, having filed his Petition of Intervention pleading to the merits, cannot afterwards plead to the jurisdiction.

2nd.—But the Intervenient has himself pleaded to the merits. Hence a question arises partly of law and partly of fact. Can an Intervenient plead to the jurisdiction after pleading to the merits? And has the intervenient actually pleaded to the merits?

Exceptions to the jurisdiction are of two kinds; as they arise from the "nature of the case,"—or are established for "the convenience of the parties." The first may be urged at any time after, as before, joining issue, and even in appeal; they should also be taken by the Court, even if overlooked by the parties; and this class, when this Island was divided as regards jurisdiction into various Courts, each having its exclusive rights and powers—as is the case in most other countries even at this day—must have been very numerous. But at present the original jurisdiction devolving on District Courts by the 24th and following clauses of the Charter, is so extensive, that they can seldom occur. True the 24th clause provides that Civil cases shall be tried at the "residence of the defendant," or in the District where "the act, matter or thing, in respect of which the suit is brought; shall have been done or performed." But both these specifications clearly have reference to the convenience of the parties alone. The "residence of the defendant" is obviously selected for his benefit; and as regards the place where the "act was done," this is chosen in conformity to another principle, by which a person entering into an engagement by contract or quasi-contract in any place, shall be understood to have selected that place as his domicile, so far as regards the fulfilment of that particular engagement. This construction is further borne out on comparison of the 24th with the 29th clause of the Charter, by the latter of which, District Courts are invested with an "exclusive jurisdiction as between them and all other Courts;" but the District Courts have no such "exclusive"

jurisdiction as among themselves by virtue of the 24th clause. The assumption of the original jurisdiction of a District Court by the Supreme Court, would therefore leave an opening to an exception, which might be pleaded at any time as it arises, from the nature of the case, the Supreme Court having *no* jurisdiction in Civil matters except by appeal ; but as between District Courts themselves, the defendant may waive a privilege established principally, if not exclusively, in his favour ; for every District Court has jurisdiction cases of the like nature, and the Court is not expected to know where parties come from, or where an "act" was performed. Exceptions of the second class must therefore be pleaded *in limine litis*, or before discussing the merits, and the Court is of opinion that this is an exception of that class.

As to the question of *fact*, whether the Intervenient has entered on the merits, it is clear he has done so by his petition of intervention, which went exclusively to the merits ; the plea to the jurisdiction having been only tacked on to the original petition subsequently, after the proceedings had been had on the merits. This plea can, therefore, only be viewed as a substantive and subsequent motion.

The order appealed from is therefore set aside, and the case referred back to the District Court of Colombo. Though this case was not made *collective*, the three Judges of the Supreme Court were present at the argument, and concurred in the Judgment.—[No. 6,961, D. C. *Colombo*, S. (J.)

Mar. 2, (J.)

559.—*Parlett* v. *Pettachy Chitty*.

In this case an order was made on the 15. Feb. (see ante p. 218.) directing evidence to be taken on the point of damages. The Court having now

Final Decree in *Parlett* v. *Pettachy Chitty* (See ante. p. 218.)

heard evidence on the point reserved, was of opinion,—"that the deficiency in the coffee stipulated for in both agreements, might be taken at 215 cwts; and the loss on that quantity, owing to the rise of the price, at £150. And as no special damage had been pleaded, it awarded that sum as damages for the breach of the covenant."—[No. 16,230, D. C. *Colombo*, S. (J.)

560.—*Fernando* v. *Fernando*.

Qu? Whether Ord. No. 8 of 1834 applies to a joint inheritance.

This was a case concerning a Planter's share and possession, in which the Court below not having heard the evidence of the defendant's witnesses, the judgment was set aside, and the case remanded for further evidence. Jeremie, J.—It is not certain that the Ordinance of 1834, regarding Prescription, applies to matters of joint inheritance. This, however, is too important a question to be incidentally discussed. The defendant's witnesses were therefore prematurely waived, and he is allowed to examine them on discharging the costs hitherto allowed.—[No. 2,866, D. C. *Caltura*, (J.)

561.—*Atchy Umma* v. *Mahamadoe Lebbe*.

A sale in execution—how established in evidence.

A sale in execution cannot be deemed proved until the documents are produced, or their non-production is satisfactorily accounted for.—[No. 8,567, D. C. *Caltura*, (J.)

March 5, (J.)

562.—*Ederevireachigey* v. *D. S. Wirewarne*.

It is a known practice for a family to hold a drove of cattle

The plaintiffs in this case claimed a share out of a drove of cattle, which they alleged to belong to them jointly with the defendants. The defendants denied the plaintiffs' right to any of

the cattle ; and the Court below having given judgment for the defendant, the plaintiff appealed therefrom.

for several generations.

JEREMIE, J.—It is a known practice throughout the Island, for a family to hold droves of cattle in common for several generations ; and that the cattle in question were held in common to a very recent period, is indisputably proved. As to the size of the drove, the witnesses speak to fifty or sixty. The plaintiffs by their libel claim sixty-seven : the Court therefore conceives that taking the number of fifty, it makes every possible allowance in favour of the first defendant. The decree of the District Court is consequently reversed, and in lieu thereof it is now decreed that first defendant do forthwith account for fifty heads of cattle to the plaintiffs and second defendant, in the proportions claimed by them,—being a quarter to each family. And that he do further account to each for the profits arising from their respective shares, for two years preceding the commencement of this suit, and up to the day of final settlement. In case of any difficulty as to the value of the cattle, or the amount of the profits, the same is to be summarily assessed by the Court below. The first defendant is to defray all the costs.—[No. 329, D. C. *Tangalle*, (J.)

563.—*Braybrooke* v. *Perera*.

This is an action for a breach of covenant brought by the Deputy Commissary General against *Cornelis Perera*, a Brick-maker, who, on the 2nd July 1836, undertook to furnish the Department with Bricks, from the 1st day of April 1836, to the 13th November 1837, at £1. 3s. per thousand. The Contract provides as follows :—

1. Where it appeared that the defendant, who had contracted to deliver goods within a certain time, had delivered certain portions for which however he did not receive payment, and as to the re-

" The said *Cornelis Perera* engages to deliver over to the Commissariat Department 20,000 bricks on or before the 15th day May, and

mainder, was prevented from delivering the same by reason of an inundation, the Court refused to give damages against him.
2. All stipulated penalties are reducible; especially where there is no reciprocity in the penalties.
3. The receipts for the deliveries not being negotiable, the defendant was held bound not to produce them on demanding payment.

80,000 more on or before the 15th day of August 1836; and also engages afterwards to supply whatever quantity may be required to keep up a stock of 20,000 bricks always on hand ready for immediate issue."

The Agreement then contains *four* sets of penal clauses entered into by the defendant, besides his consenting, in case of failure, to allow the plaintiff to purchase bricks elsewhere at any price, and charge them against him at the price paid for them.

The plaintiff in his libel, dated 14th February 1837, alleges that, instead of supplying the 20,000 bricks due on the 15th May, and the 80,000 on the 15th August, the defendant had only given on both these stipulations 16,610 bricks, leaving a deficit of 83,390; and that having on the 30th September, received an order to supply 20,000 in addition, he had only furnished of these 5,983; and he claims, in consequence, the sum of £177. 18s. the aggregate of the four several penalties.

It appears from the plaintiff's own witnesses that the defendant had furnished, not 22,593 bricks,—as stated by plaintiff,—but 63,583 being near three times that amount, and upwards of three times the quantity deliverable by virtue of the first stipulation in May 1836. It also appears from the same witnesses that the only payments he has received amount to £11 sterling;—£8 in March, and £3 on the 5th July 1836: so that there remained due to him, on that contract,—when the action was entered,—a balance of upwards of £62. sterling,—the value of more than 50,000 bricks.

The defendant proves that his brick-fields were inundated during the contract, and that he had in consequence found a sub-contractor at a profit to defendant of about ten pence per thousand, who was prepared to supply the whole quantity required, but who refrained from doing so owing to his not receiving payment from the defendant for the 8,400 that he had actually delivered, and

the defendant adds, "If I had been paid for the bricks I had supplied, I should have furnished the bricks by purchasing from others;" but he admits that there were delays in the delivery.

Under these circumstances the Court cannot allow any damages. It has already on several recent occasions expressed its opinion that all stipulated penalties are reducible; and most especially would this principle hold when penalty is accumulated upon penalty for the same act, and where there is no reciprocity in the penalties: so that under any circumstances, the Court would never grant more than a full and fair indemnification, including however, in cases like the present, not only the pecuniary injury arising from a fluctuation of prices, but also an ample consideration for the very great detriment and inconvenience suffered by the public. But, on the other hand, the party contracting for Government, must expect to be bound down with equal rigour to his engagement, and if he fails in them, the consequences must fall on him and him only. In the present instance there has been irregularity on both sides, and there is sufficient reason to infer that it commenced with the plaintiff, and that it has caused serious loss to the defendant. A very great consideration with Government contractors is punctuality in the payments; and no other time being stipulated in this agreement, the money became due at the times stipulated for the bricks becoming due. The first delivery was on the 15th May; the first payment was therefore due on the 15th May. It amounted to £23. The defendant had then received £8, and subseqnently got £3. There is, consequently, a balance of £12 still due on that delivery alone. But it has been urged that the bricks were not delivered on the 15th May. It happens that this agreement is dated the 2nd July, or *six weeks subsequently;* it is therefore *retrospective.* Now the Court never can for an instant entertain the idea that it was plaintiff's deliberate intention to bind down the

defendant under accumulated penalties to the performance of a physical impossibility,—nor would such an undertaking be valid if entered into. The only fair, or, indeed, possible inference, therefore, to be drawn from this material circumstance is, that on the 2nd of July the plaintiff had no cause of complaint whatever against the defendant, and therefore that the deliveries due in May had been regularly made, or that any trifling delay had been most satisfactorily accounted for and remedied;—in either of which alternatives, the balance was certainly due on the 2nd July, when, instead of £5, a great object to men of this class, the defendant received £3. And this does away with effect of the first letter put in by the plaintiff, whilst it greatly alters the view to be taken of the remainder of the correspondence.

Next, as to the observations that the defendant should, to obtain payment, have produced his receipts for the deliveries, and demanded payment. That he demanded payment is proved by his receiving £3, and it must be remembered that all the testimony as to these extensive deliveries and trifling payments is elicited from adverse testimony, in contradiction, as regards the deliveries, to the express averments of the plaintiff's libel. There is nothing to shew that the receipts were negotiable, or transferable by endorsement, and any objection on that head should have been explained at the time the contract was signed.

The decree is therefore set aside, and plaintiff's action dismissed; and as there is no doubt of defendant's irregularity in the deliveries (he admits it,) he is not to recover costs. His right of action is, however, fully reserved to him for the balance, about £62, still due to him, which cannot be adjudged at present, as he has made no claim in reconvention.—[No. 171, D. C. *Colombo*, S. (J.)

May 9, (J. St.)

564.—*Rodrigo* v. *Fernando*.

The District Court has, in this case, directed a person suing in *forma pauperis* to give security for his adversary's eventual costs. This is a proceeding perfectly novel, and which cannot be sanctioned. The precautions taken to prevent an abuse in suing as a pauper, are set forth in the Rules, and if further restrictions on this form of process become requisite, they can be considered by the Supreme Court hereafter. But to require security for an adversary's costs, from a person who has proved that he has not the means to pay his own, were to deprive the pauper, at the outset, of all relief from any injustice; whilst, though his opponent may be exposed to some inconvenience as things stand, yet, if he is succesful in his suit, he will be always at liberty to sue out execution for costs against the person, and thus punish him by imprisonment, if he cannot pay. The order of the District Court is therefore set aside, and the case is to proceed. [No. 4,885, and 4,886, D. C. *Chilaw*, (J.)

A party who has been admitted to sue in *forma pauperis* cannot be called upon to give security for costs.

But, if cast in costs, execution may be issued against his person.

May 23, (R. J.)

[The Hon'ble John Jeremie, Esquire, was sworn in as *Chief Justice*.]

[The Hon'ble John Frederick Stoddart, Esquire, was sworn in as *Senior Puisne Justice*.]

May 30, (J. St. C.)

[The Hon'ble William Oole Carr, Esquire, was sworn in as *Second Puisne Justice*.]

565.—*Taldena Korale* v. *Gedera Arawi*.

Upon very special circumstances being proved, with an offer made of payment of the plaintiff's costs, the Supreme Court has granted the indulgence to a defendant of putting in an answer after a general denial has been entered;

When after a general denial, the defendant prayed for leave to answer, but stated no spe-

cial circumstances in support of his prayer, the Court refused leave.

but in the present case no facts whatever are specially alleged in support of this application; there is only the general averment "that defendant by unfortunate circumstances was prevented to file answer." His Proctor had been appointed also some days before, and it does not appear even that there is any special ground of defence, which could not equally be given in evidence under a general denial. Under these circumstances, to permit the defendant on this application to file an answer, would only be to allow of an evasion of the Rules laid down against delay; and the Proctor drawing this frivolous Petition of Appeal, is decreed to pay the costs thereof.—[No. 7,728, D. C. *Badulla*, (C.)

June 6, (J. St. C.)

566.—*Sleema Lebbe Odeyar and others* v. *Sewette Oemma and others.*

When on a question of disputed title to real and personal property, the S. C. found that the plaintiffs were *non compotes mentis*, and that the property was in the hands of two of the defendants who confessedly had no claim to it; the case was sent back with directions to the D. C. to appoint a guardian over the plaintiffs, and also a Receiver to the real property; and, thirdly, to cause the personalty to be, paid into.

The plaintiffs by their libel state that they are the step sons of *Tanga Oemma* deceased, whose first husband *Awakka Lebbe* was their uncle, and the second *Sleema Lebbe Odeyar* their father. They claim as "heirs at law," to all the property left by her, which, they say, was chiefly derived from her two husbands. This property, real and personal, amounts to £229. 12s., according to an inventory filed by them, including a *Royal Sannas* for the land.

The first defendant replies that he is in possession of the lands and two rooms on account of the estate of *Tanga Oemma*, which he holds under authority from the 3rd defendant, *Tanga Oemma's* sister. This property he states originally belonged to *Aboobaker Lebbe Adjar*, who bestowed all his moveables and dwelling house on his wife *Tanga Oemma*, by a written document, and his remaining estate, the lands, by verbal request. The 1st defendant states himself to have been in this person's service, and charged with the management of his property for forty years. He admits he has no

legal claim to the estate, and adds, that he is prepared to account. The 2nd defendant acknowledges to the possession of *Tanga Oemma's* personal property, which he holds by consent of all parties, and also declares his readiness to account, but denies that he has the *Royal Sannas.* The 3rd defendant, who states herself to be "uterine sister" of the deceased *Tanga Oemma*, claims the whole property as her next of kin. She denies that the plaintiffs were ever brought up by the deceased as their guardian or fostermother, and maintains that the property in dispute belonged to the deceased in right, *not* of their father, her second husband —but of their uncle, her first; states that the plaintiffs enjoy the estate of their father, from which she claims one eighth in right of *Tanga Oemma*, her deceased sister; and she explains, in the same manner as the 1st and 2nd defendant, how this property became *Tanga Oemma's*, viz: the house and personalty on a document; the remainder of the real estate by verbal bequest of *Aboobaker* or *Awakka Lebbe.*

Court, pending the suit.

Hence several questions of law and fact; which it would be incumbent on the Court now to consider, were it not that on the evidence, (ordered by decree of the Supreme Court of the 17th May 1837, on an appeal from the decree of the District Court of the 5th of November 1836,) being gone into, it has been shewn that the plaintiffs are,—if not in a state of total idiotcy,—in such a state as renders them incapable of managing their own affairs, and certainly unfit to beentrusted with the care of their co-heirs' interest, who are, it seems, under age. The pleadings are also extremely confused and irregular,—the two following facts alone being distinctly established:—1st, that the whole of the property in dispute is in the hands of the 1st and 2nd defendants, who can have no claim or title to it; and 2nd, that these two persons are principals in maintaining this suit, if not, in fact, its sole promoters, though they have no

kind of personal interest in it. It becomes therefore, the duty of the Court to take the preliminary measures requisite, for protecting the true interests of the parties, for securing this property to its right owners, and enabling each to bring their claim to an issue in proper form. The case is, therefore, referred back to the District Court of Kandy, with directions, 1st, to appoint a guardian for the plaintiffs,—the children of *Sleema Lebbe*,—in the manner prescribed by Rule 18 sec. 4 of the Rules and Orders; 2dly, to appoint a Receiver to the real property in dispute, comprising all that formerly belonged to *Aboobaker Lebbe*; and 3rdly, to cause the personalty to be paid forthwith into Court. Whatever claims the 1st and 2nd defendants may have on the property in their hands, can be taken into consideration on their accounting for the same, and for the rents and profits arising from the real property from the day of *Tanga Oemma's* death,—which account is to be rendered by a separate action if necessary, in presence of the guardian to the plaintiffs, of the 3rd defendant, and of the Receiver. The present suit is then to be proceeded in by plaintiffs, through their guardian and 3rd defendant alone. Both parties are at liberty to amend their pleadings, pointing more distinctly in what right they claim, and when this is done, further evidence may be called on either side; the witnesses already heard need not be examined again, except the parties wish it. The Court will then pronounce its decision, subject of course to appeal. The costs hitherto incurred by plaintiff and 3rd defandant, are to be discharged from the common fund, as are the necessary expenses which will be caused by appointing a guardian. Should the 3rd defendant not have sufficient means of support, the District Court can allow her, pending the further suit, a moderate alimony from the common estate. The plaintiffs have, it is said, their father's estate.—[No. 7,796, D. C. *Kandy*, (J.)

567.—*Chitty* v. *Marimuttoe.*

The defence in this case amounts to a plea of part satisfaction, which the plaintiff and appellant maintains cannot be proved orally, on an action to recover the amount of a bond.

Parole evidence is admissible to prove satisfaction of a specialty.

The uniform practice of this Island, however, —a practice conformable to equity,—has been to admit parol evidence in proof of satisfaction of a specialty.—[No. 5,706, D. C. *Trincomalie,* (J.)

568,—*Vanderstraaten* v. *Fernando.*

The District Court, it appears, decided this case summarily under the 11th Rule, under which it could act only on the statements and admissions of the parties in the pleadings on their examinations; whereas the District Court has admitted the evidence of a witness, on behalf of the plaintiff and respondent, to contradict the statement of the appellant. The proceedings are referred back for replication to be filed, and evidence to be taken in the usual manner.—[No. 4,522, D. C. *Caltura,* (C.)

The D. C, if it proceeds under rule 11 of Sect. 1., cannot admit the evidence of a witness to contradict the statement of the party.

June 13, (J.)

569.—In *re Sinne Tamby Caderie Naide.*

In affirming this decree, the Supreme Court thinks it right to observe, that Letters of Administration cannot be refused at any period after the death of an Intestate; but what may be the effect of these Letters of Administration, if it be true that the property of the deceased was divided among the heirs shortly after his death, is a question which is still perfectly open.—[No. 4,195, D. C. *Negombo,* (J.)

Administration cannot be refused a any period after the death of an intestate. Qu ? How far it may affect a division already made among the heirs.

570.—*Silva* v. *Sillinda and others.*

The plaintiff in this case claimed certain lands, and, amongst other evidence, produced a Certificate of quiet possession, in support of his title.

A Certificate of quiet possession, though not conclusive

against a subsequent claimant, who can satisfactorily account for his silence, is conclusive against one whose claim has been set aside.

The Court below after hearing the witnesses of both parties, gave judgment in favour of the plaintiff and the 1st and 6th defendants, according to certain rights proved by them respectively.

On appeal by the 1st defendant, the Supreme Court pronounced the following judgment :

"The only defendant who, in the estimation of the District Court, has made out a case against the plaintiff and the 1st defendant, is the 6th defendant, *Cattadiegey Babba*; but this happens to be the very person who opposed the certificate of quiet possession, and then failed to follow up his claim ; and though it be true that, by a judgment of this Court on appeal from *Amblangodde*, No. 976, it was held that Edictile Citation under the old form "would not, "and ought not to be held conclusive against "subsequent claimants, if such claimants "could account satisfactorily for their silence "during the time the citation was pending;" this process has never been considered otherwise than conclusive against claimants who actually came forward, and whose claims, it matters not from what cause, had been set aside. The decree is therefore reversed in so far as it relates to the 6th defendant; and the plaintiff and 1st defendant are in their several rights quieted in the possession of the property claimed by the libel, with costs.—[No. 565, D. C. *Tangalle*, (J.)

June 14, (J.)

At Chambers.

571.—In *re D. M. Banda.*

Injunction granted on a mere Petition, where there was no time to obtain the necessary affidavit.

On reading the petition dated Kandy the 11th instant, 1838, and considering that there is no time to obtain the necessary affidavit, or any authentic information on the subject of the petition ; It is ordered, that an Injunction do issue against the Honorable *George Turnour*,

Esquire, Fiscal of the Western Province, his officer or officers, and all other person or persons acting under his or their authority, under the penalty of £100, to desist from proceeding to the sale of the estate called *Dodanwelle*, in his Province, until he shall receive directions herein from this Court.

June 20, (J. St. C.)

572.—*Abesekere* v. *Silva*.

Every holder of property in common, is entitled to call for a partition or sale. Form of Order for Partition.

In this case the plaintiff and appellant has adopted a mode of partition which is not warranted by law or practice. At the same time it is the opinion of the Supreme Court that, by the established law of this Colony, every holder of property in common, is entitled to insist upon a fair partition, and where the property cannot be conveniently divided, to call for a sale. In case No. 686, from *Galle*, it was ordered by the Supreme Court, that "the said garden be actually divided between the proprietors thereof, "by such person or persons as the District "Court shall appoint, and that the division so "made should be considered to be the carrying "of this decree into effect, and that the respective shares of the parties when divided, be "marked by boundaries;" and the Court is of opinion that, until a specific form of process is laid down by some rule or order of the Supreme Court, the precedent established in that case, should be adhered to. The judgment of the District Court is therefore affirmed, inasmuch as that thereby the Survey dated the 10th August 1836, filed in the cause, is cancelled, and that it is declared that the plaintiffs are entitled to five twenty-fourths of the garden; and it is further ordered, with a view of effecting a partition of the said property, that the same be actually divided between the proprietors thereof, and the division so made be considered to be the carrying of this decree into

effect, and that the respective shares of the parties, when divided, be marked by boundaries. Each party will pay his own costs.—[No. 1,543, D. C. *Amblangodde*, (J.)

June 27, (J. St. C.)

573.—*Peer Mahamadoe* v. *Sutherland.*

The articles of War allow of an action, but do not permit execution.

The 111th section of the articles of war has immediate reference to the provisions of the 3rd section of the Mutiny Act, which allows of an action being entered, but does not permit execution against the person, or, as a necessary consequence, against any of the effects belonging to defendant *as a soldier*. The Court was, therefore, justified in allowing the action to proceed, but it will, of course, be cautious how it permits execution.—[No. 6,181, D. C. *Trincomalie*, (J.)

574.—*Ismael Lebbe* v. *Seka Lebbe*,

Where the plaintiff proceeds on a penal Bond, the Court may decree interest, though not claimed in the Libel.

The defendant in this case, who was sued on a Bond with a penalty, appealed against the judgment of the Court below, on the ground that it decreed him to pay interest, whereas none was claimed in the libel.

JEREMIE, J.—Though no interest has been demanded by the libel, the penalty of the bond was, and interest is nothing more or less than a legal penalty, recoverable for undue delay in the payment of the principal: when, therefore, the conventional penalty was set aside, the legal penalty became due.—[No. 2,886, D.C. *Galle*, (J.)

July 4, (J. St.)

575.—*Pillindevidahnelagey* v. *Punchyhemegey.*

In directing the attendance of parties and witnesses, the Court will, in view of the customs of

All persons of either sex, however repugnant it may be to their feelings, are bound to appear and give testimony in Courts of Law, when such testimony is requisite in furtherance of the ends of justice. But, on the other hand

their sentiments and feelings are not to be wantonly, vexatiously, or maliciously outraged, at the caprice of litigious suitors.—[No. 4,162. D. C. *Matura*, (J.)

the country, respect their feelings.

July 7. (J. St. C.)

576.—*Philippo-Vidahnelagey* v. *D. H. Dias.*

This was an action for false arrest. The plaintiff complained that the defendant had in a previous case arrested him on a Writ of Execution pending an appeal from the judgment.

Qu? Whether an arrest before the expiration of the period allowed for appeal, would be a false arrest?

Jeremie J.—Had the defendant arrested the plaintiff before the expiration of the period allowed for entering an appeal, it would have been a very serious and important question to consider whether damages could be recovered. But in the present case, the decree had become final when the writ of execution was issued, and the subsequent appeal was allowed as an indulgence. The Court is therefore unanimously of opinion that an action for damages does not lie.

The decree of the District Court is therefore reversed, and plaintiff's libel dismissed, without costs.—[No. 2,077, D. C. *Amblangodde*, (J.)

In re *Casim Bibie.*

577.—Application of *Sugee Bibie.*

The Interlocutory Order of the District Court of Trincomalie is affirmed, as to the rejection of the application of the appellant for a grant of general administration, without furnishing securities; but under the special circumstances of this case, the appellant being clearly unable to furnish the usual security, and appearing to have a claim to the whole residuary estate of the deceased, as her mother and sole next of kin, the District Court might allow, upon the personal Bond of the appellant, without requiring the usual sureties, a limited grant of administration to be issued to her, for the purpose only of collecting the outstanding credits of the deceased,

Where it appeared th t the applicant for administration was unable to furnish security, but was the sole next to the deceased, the Court directed a limited grant.

and paying the sums received on account thereof into the Court, to be deposited at interest, until such time as is necessary to ascertain whether any and what debts are due, or if any will has been made; when the District Court can make such further order therein as may be required; and subject to such further order, and until the same be made, the interest of any sum so deposited shall be paid over to the appellant for her own use.—[No. 6,374, D. C. *Trincomalie*, (C.)

August 25, (J.)

578.—*Oedema Lebbe* and another v. *Istova Anthony* and another.

The Proxy of one of several Partners is sufficient to authorize an action.

There can be no doubt that the brother was warranted in signing his brother's name; but the Proxy was a joint one, and the signature of one of the partners was sufficient to authorize the action.—[No. 4,306, D. C. *Butticaloa*, (J.)

September 5, (J.)

579.—*Cader Lebbe* v. *Walker*.

In an action for work and labour, where the defendant pleaded a written agreement, and that one of the conditions thereof had been broken by the plaintiff, but refused to produce the agreement; the Court entered up judgment for the plaintiff.

It is proved that a special agreement was drawn up and delivered to the defendant and respondent. This document the defendant has not produced. He declined an arbitration and refused to name Commissioners, even to ascertain the amount and value of the work performed, declaring that plaintiff had not done sufficient for the amount he had actually received, viz., £10, which, by the unanimous Report of the Commissioners, proves to be incorrect: for it is shewn by them, that the work actually performed is equal in value to £24 6s. Under such circumstances the Court, notwithstanding the admission of the plaintiff as to one of the conditions of his engagement, conceives that there is no sufficient cause to deviate from the general principle, that one party shall not unduly profit by the labour and industry of another.

The condition that the house should be put in *perfect* repair, may have been made, and probably was, one of several conditions; for there must have been some motive for withholding the written agreement; and as all the conditions cannot be known through the act of the defendant himself, the Court is not to attach itself to this one specific condition, or to deprive, upon that ground, the plaintiff of a fair and equitable remuneration for his labour.

The decree is therefore reversed, and defendant adjudged to pay the plaintiff the sum of £24 6s.,(as assessed by the commission,) deducting the £10 already paid, with interest from the day the action was brought, and costs.—[No. 18,701, D. C. *Colombo*, S. (J.)

Sept. 12, (J.)

580.—*Galganegey* v. *Badalenne Unanse.*

A Bailee, who is not to receive any remuneration for the custody of property, is not bound to take that scrupulous care of it, which would otherwise be required of him.

It is clear that the defendant was responsible and bound to account for the property, as it was in his possession; but it is also clear that, as he received no remuneration, he was not bound to take that scrupulous care of it, that would otherwise have been required of him. And he has shewn to the satisfaction of the District Judge and Assessors, that the paddy was actually stolen, whilst the negligence that led to the theft, is, under the circumstances, to be imputed rather to the plaintiff. - [No. 1,741, D. C. *Ratnapora*, (J.)

581.—*Casie Lebbe* v. *Sinne Packier.*

Where a debtor of a firm granted a Bond to one of the partner's and the other partner, after a subsequent disso-

The plaintiff brought this action to recover certain monies from the defendant; to which the defendant answered that he had given a Bond for the amount to the plaintiff's late partner *Cattoo Lebbe Marcan.* Judgment having been given in favour of the plaintiff in the Court

lution of the partnership, sued the debtor for the amount, *Held* that the plaintiff had no right of action.

below, the defendant appealed therefrom, and *per* JEREMIE, J.—" The individual who has been examined as a witness, being plaintiff's late partner, should, if heard at all, have been made to intervene and examined as a party. But the District Court will perceive on referring to this Court's last decree, (*ante*, p. 154), that the *onus probandi* fell upon the plaintiff: it was for him to establish the fact that he had notified to the defendant that he the plaintiff was the liquidating partner, which he has not done. Indeed it is now shewn by the production of the Bond, given by defendant to *Cattoo Lebbe Marcan*, which bond is not disputed by the plaintiff, that it was given before the dissolution of the partnership, so that the plaintiff never had from that date a right of action against the defendant. For the bond was legally given to his partner, and the defendant was bound thenceforth to pay the bearer of the bond. Plaintiff's action is therefore dismissed with costs. The partners must settle their accounts among themselves ; but are not to molest third parties because of their private differences".—[No. 4,788, D. C. *Uttuan Kandy*, (J.)

582.—*Oedoema Lebbe* v. *Govt. Agent, N. P.*

A Proctor when called upon to report upon a Pauper-petition, is bound only to inquire into the case of the petitioner, and not to go into the possible defence of the opponent upon information obtained from him.

It appears to the Supreme Court that Proctors throughout the Northern Province go somewhat beyond their duty, when Pauper Petitions are enferred to them. They ought, in fact, only to enquire whether the applicant has made out a good *prima facie* case, and not to go into the possible answer to that case by means of information obtained from his opponent. The check upon paupers wilfully deceiving the Court is by punishment, which may also, in some cases, extend to the witnesses who have made an affidavit in their favour ; but to call upon a Proctor to investigate both sides, before the pauper can bring his case into Court, is to make him an additional Judge in the cause, which was never contemplated.

On the second point taken by *Mr. Toussaint* in the present case, he is clearly mistaken. The Prescription Ordinance does not apply. And as regards the first, did he obtain proof that the applicant was still indebted to Government from the admission of the applicant himself, or his own witnesses; or did he get it from the Government? If from the former, viz. the applicant, or his witnesses, he was right in reporting as he did; if from the latter, he was not warranted in making the inquiry. The Supreme Court is aware that Proctors have erred in this respect from the best motives; it therefore imputes no blame to them, whilst it feels bound to correct a defective practice.

The case is referred back for the Proctor's further report.—[No. 37, D. C. *Jaffna*, (J).

Sept. 19, (J).

583.—*Welayden* v. *Appoo Chetty*.

Where a judgment has been entered against a defendant without notice, his remedy is not by appeal.

The Appeal being frivolous, the appellant was cast in double costs.

The defendant in this case appealed against the judgment of the Court below, on the ground that he had not been served with notice.

Jeremie J.—This is a very frivolous appeal. The appellant must have known that if his statement was true, viz., that he was not served with a notice, though the Fiscal had duly reported service of notice, his remedy was not by appeal. His object was, however, evidently to obtain a delay. The decree of the District Court of Jaffna is affirmed with *double* costs.—[No. 5,608, D. C. *Jaffna*, (J).

584.—*Oemeatte* v. *Welayden*.

A Proctor, when called upon to report on a Pauper petition, is not bound to investigate both sides of the case.

It appears to the Supreme Court that Proctors throughout the Northern Province go somewhat beyond their duty, when Pauper Petitions are referred to them. They ought, in fact, only to enquire whether the applicant has made out a good *prima facie* case, and not to go into the possible answer to that case by means of informa-

tion obtained from his opponent. The check upon paupers wilfully deceiving the Court is by punishment, which may also, in some cases, extend to the witnesses who have made an affidavit in their favour; but to call upon a Proctor to investigate both sides, before the pauper can bring his case into Court, is to make him an additional Judge in the cause, which was never contemplated.—[No. ——, D. C. *Wellegamme*, (J).

Sept. 26, (J. C.)

585.—*Armogem* v. *Stark*.

No action lies against a Surgeon for having ordered out the Plaintiff from a room in which the former was performing his duties as Vaccinator.

The defendant used angry gestures towards the plaintiff; he ordered him to leave the place they were in, without any insulting language and without striking him.

Now what was the provocation?

The plaintiff is a servant; the defendant a Regimental Surgeon, employed at the time in an important but unpopular Government duty—vaccinating the native inhabitants. The spot selected for this purpose was a Government School, into which premises the plaintiff entered by leaping over the wall. He then failed in the usual courtesies to a superior in station, and so conducted himself as, in the estimation both of defendant and his Medical Assistant, besides others, to interrupt them in their duty. But the place was "as public as the Court." Supposing it to have been so, will it be contended that he, who in the opinion of the judge disturbs the proceedings of a Court—whatever the nature of the disturbance—is not liable to be removed, whether standing immediately outside or inside the Court? And what the judge had a right to do, so had *Doctor Stark*: he was at liberty to insist on proper order being maintained; to require the withdrawal of those who interrupted it; to

enforce his order by the use of moderate force; and if they still disobeyed, he might bring them to punishment before the Judge; whilst the latter could punish them himself. This is the only difference. But whatever may have been the general or usual destination of the place occupied by defendant, the Supreme Court cannot admit that it was on that particular occasion as public as the Court. Publicity is necessary and generally prescribed by Law in judicial affairs; but this is evidently by no means the case with medical operations, which being generally far more conveniently conducted in private, it was for the defendant and him alone to determine who should be admitted to them. The locality signifies nothing, for so long as he occupied the school room by permission of the proper authority, he was invested with all the rights of a proprietor over those premises, and as such was at perfect liberty to remove any person whatever from them whose attendance was not required there. As to the defendant's tone and manner, whilst the Supreme Court perfectly concurs with the District Court, that courtesies are perfectly optional, it cannot but add, that if a person standing in the relation of life that plaintiff did to defendant, refuses him the usual courtesies, he can scarcely in his turn expect that any peculiar civility of deportment will be exhibited towards himself. The Court therefore, so far from considering the defendant's conduct worthy of censure, (no blow having been struck, no improper language used.) conceives, on the contrary, that he was fully justified in ordering the plaintiff to quit the premises, and that he is perfectly excuseable in the manner in which he did it. But it holds the whole conduct of the plaintiff highly censurable; so much so, that nothing but the deference it entertains for the opinion and judgment of the District Court, however, on this occasion, contrary to its own, could have induced it to confine itself, as it now does, to the dismissal of plaintiff's action.—[No 6,762. D. C. *Trincomalie*, (J).

586.—*Adam Lebbe* v. *Hamado Nachia*

Abdul Rahim, Intervenient.

Though, as a general rule deeds of thirty years standing do not require proof; yet the rule is open to exception whenever the deed is of a suspicious nature.

This was an appeal by the defendant against a judgment pronounced by the Court below decreeing certain lands to the plaintiff. The judgment, in appeal, (*per* JEREMIE J.) sets out the facts :

" As regards mere possession, the Supreme Court is by no means satisfied with the evidence, especially that for the plaintiff. And with respect to the documents, the District Court has fallen into an error in stating that both the deeds are produced by the plaintiff. The second (B), the original grant, the authenticity of which cannot be disputed by either party, as it is the original title under which they both claim, was filed by the defendant on the 17th January 1857.

" Document A the Supreme Court cannot but consider a very suspicious one ; it conveys the whole estate, whilst the plaintiff only claims half ; then it would, if genuine, have been accompanied by the transfer of possession of the original grant, which would in that case have been filed by the plaintiff, as the District Court originally supposed it had been ; and there are other circumstances leading to the same conclusion set forth in the petition of appeal.

" Though therefore, deeds of thirty year's standing are, when accompanied by possession, to be generally considered as not requiring proof, this rule is open to exception wherever the deed is deemed of a suspicious nature. In such cases the best proof that can be got must be produced. For instance, when the writer and all the witnesses are dead, the party must prove them dead, and then prove their hand-writing, or the hand-writing of some at least of them. On these grounds the present case is referred back for proof by the plaintiff, subject to the counter-proof by defendant, of the authenticity of the said deed Lr. A."—[No. 2,986„ D. C. *Ruanwelle*, (J).

587—*D. Dona Susana Hamy* and an other v. *G. Sanchy Hamy* widow of *G. Andris Appoo* and others.

Judgment. That the decree of the Court below be reversed, and the 1st plaintiff declared entitled to one-fourth of the land in dispute, which she has possessed uninterruptedly so many years. The Regulation No. 8 of 1809 is merely declaratory of what the law was at the time it was passed; it makes no alteration or new law; and the Supreme Court has in former cases of this nature, favoured alienations of such lands made before the passing of that Regulation, not only because the very necessity which existed for such a declaration shews that the law, as it stood, was imperfectly known, but because under the prior enactment of Governor North such lands were considered alienable as private property. Possession for ten years subsequent to the Regulation No. 8 of 1809, could not certainly, be considered as giving a prescriptive title to the possessor, under the Ordinance regulating the prescription of actions; but the long enjoyment by the 1st plaintiff and her mother, of the above share prior to the said Regulation No. 8 of 1809, being for a period of 40 or 50 years, raises a presumption in law of an old grant in their favour, which is confirmed even by the defendant's own witnesses, who state that the plaintiff's mother had been given a portion of her brother. The above decision is between the parties in this suit only, and not affecting any claim of, or title in the Government to this land. *D. C. Colombo*, S. No. 164,63. (C.)

Alienation of Service Praveny lands Effect of Reg. No. 8 of 1809.

Prescriptive Possession of Service parveny. land.

October 2. (C.)

588—Sidowey widow of *Cadiren* and her son *Cadiren Sidembery* v. *Ramer Wayramottoe* and others.

The District Court, in deciding cases upon the pleadings or examinations of the parties, without

Course to be adopted in de-

ciding cases upon the pleadings and examinations of parties.

examining witnesses, should decide only on the Law, and on the established facts then clearly appearing in the proceedings before it, either by the direct admission of the parties or under documents produced by, or admitted by them; but the Court ought not so to refuse to hear evidence in support of allegations by parties in a cause, merely because the Court itself does not believe the probability of the alleged facts which the party wishes to prove: provided only that such facts if satisfactorily proved, would be relevant to the issue in the suit, or any matter in dispute therein between the parties. No. 3,046, *D. C. Wellegame*, (C.)

October, 10 (J. C.)

589—*Sembate* v. *Colende.*

The remedy against any omission or defect in the Judgment of a D. C. is appeal to the S. C. and not by a fresh action.

The decree of the Court below, which was in favour of the defendant, was affirmed, and the proctor for the plaintiff disallowed his costs. The action which was to set aside the decree in a former suit, was extremely irregular, as any omission in the proceedings or defect of decree in the former Case, should have been rectified by application to this Court, on an appeal being made to it. *D. C. Wadimoratchy*, No. 1979, (C.)

590—*Jonklass* v. *Punchiralle.*

Where a Defendant has appeared and answered, he cannot afterwards object to the jurisdiction.

It has been decided by the Supreme Court collectively in former Cases that where a defendant appears and answers to the merits of a case without putting in a plea to the jurisdiction any objection by him on that ground must be then considered to be waived, by his having put in an appearance and answer without such plea. The District Court accordingly will retain this cause and proceed in the usual manner therein—*D. C. Colombo*, No. 3, No. 3736, (C.)

591—*Oodoema Lebbe* v. *Micyna Nina.*

The D. J. cannot dismiss a case by a mere

It is quite clear that no action for defamation could be maintained on this libel. The words

spoken are not in themselves actionable according to the English Law of defamation, unless special damage therefrom were laid and proved, and according to the Dutch Civil Law also, the circumstances alleged could not support the action. The endorsement, however, by the District Judge upon this libel of his opinion only of the grounds of action, is certainly an informal order or mode of dismissal of the action on the pleadings—*D. C. Chilaw and Putlam* No.—(C.)

endorsement on the libel, although such libel discloses no sufficient cause of action.

October 17, (J. St. C.)

592—In rê *William Clark* a Bankrupt.

Charles Delligal, Provisional Assignee Appellant,
and
William Clark, Bankrupt, Appellant.

1. The circumstance that the letter books are said to contain private letters, which may, if the contents be known, be prejudicial to certain claims in dispute, is no reason for withdrawing such books from the custody of the Provisonal Assignee.

2. The D. C. is never required to take the initiative in any act connected with the Bankruptcy.

3. A Court may issue injunctions to public functionaries; but cannot give them instructions to do any act.

Two orders of the District Court are now before the Supreme Court in Appeal; the first dated 25th September last, and the second the 8th Instant.

With reference to the first, by which the District Court has ordered certain letter books to be forwarded to the Court, " because they are said to contain private letters which can be of no use to the Provisional Assignee and may, if the contents be known, be prejudicial to claims now in dispute," the Supreme Court is of opinion that this is a very insufficient reason for withdrawing books from the custody of the Provisional Assignee that, on the contrary, both he and the bankrupt should long since have had the fullest access to them, and that the bankrupt should have been examined upon every circumstance whatever connected with his estate, which required elucidation. A balance sheet should have been given in by him or by the Provisional Assignee, or both, and every explanation offered with respect to it. That the Assignees should also have long since been named, but that in the mean time the Provisional Assignee is bound, under the superintendence of the District Court, to take every measure requisite for the security and preservation of the estate, and for the ascertainment, of its actual condition.

Looking generally to the proceedings, as they are now before this Court, it will observe that a District Court is never required to take the initiative in any act whatever connected with the bankruptcy; its duties are purely of superintendence and control. The requisite forms should be gone through up to the nomination of the Assignees by the petitioning creditor, except a Provisional Assignee be named; in which case the latter takes upon himself, so long as his authority endures, the management of all the proceedings prescribed by Law, and is bound to carry them through within the shortest reasonable time.

As regards the second order which directs that the Post Master General be instructed to deliver to the said Provisional Assignee all letters whatever that may arrive to the address of either *William Clark* or *White Clark & Co.* the Court will observe that no judicial authority has a right to issue instructions to the administrative officers of a Government. Courts may in certain, cases issue injunctions to public functionaries, as well as others; but instructions are out of the question.

That part of the order however, while relates to letters for *Mr. William Clark*, it is understood, has been alone remonstrated against before this Court. The Court will therefore direct its attention exclusively to it, and it is of opinion that all such letters should be delivered to the bankrupt, against whom no imputation whatever of a fraud has been thrown out; and he if they concern his estate directly or indirectly, is bound to give them over to the Provisional Assignee. The latter may also require him to be examined at any time with regard to the nature, and (so far as may be necessary towards ascertaining whether they do or do not belong to the estate) with regard to the contents of all such letters.

The order dated the 25th September, is therefore set aside, and in lieu thereof it is ordered that the said books remain in the custody of the Provisional Assignee, but that the bankrupt be at all times allowed full access to them. And

as regards the order dated 2nd instant, it is hereby declared that *William Clark* is entitled in the first instance to receive all letters whatever addressed to him. No. 21,638, *D. C. Colombo, No.* 1. *S.* (J.)

593—*John Morris* v. *James Caroll.*

Though the amount of damages ultimately decreed is an important criterion in awarding cost; yet the Court will always look to the whole merits of the case and the couduct of the parties in determining whether the costs should be in the original class or in that of the amount of the Judgment.

The decree of the District Court of Colombo No. 1. S. of the 23rd day of July 1838, is affirmed as to the amount of damages awarded, but the plaintiff is decreed to recover costs only in the fifth class, and to pay the deft all surplus costs incurred by him owing to this suit having been brought in a higher class,—in other words, the difference between defendant's costs in the fifth and sixth classes.

The test by which the question of costs should be tried, as a general principle, is whether the plaintiff was justified, by the whole result of the suit, in bringing his action in the higher class. If the plaintiff materially fails to prove that his loss amounts to the extent claimed by him, he will be deservedly made to pay the whole extra costs occasioned by his having thus wrongfully brought this suit in such a high class. In the present suit looking to the amount of damages awarded (£ 18); and that there is evidence of farrier's expenses also incurred, the Court is of opinion that the suit would not improperly have been brought in the fifth class, and that the costs should therefore be awarded between the parties accordingly.

It would be neither fair to the suitors nor proctors to reduce this case to a lower class; for, though it be true that the Court looks to the amonnt of damages actually decreed to be recovered, as an important criterion to guide it in awarding the costs, yet it is not conclusive therein, as the Court will, in considering costs, always look to the whole merits of the case, and the conduct of the parties; and judge also whether there were reasonable grounds for the plaintiff bringing his action in the class which he did; nor

will it refuse to make a just allowance for that fair latitude and exercise of sound discretion which an honest suitor, and a prudent counsel, might be expected to use in estimating the probable damages which might reasonably be given on the cause of action.—No. 20,079, *D. C. Colombo, No.* 1. *S.* (C.)

October 24, (J. St. C.)

594—*Philip Britoe* v. *Bastian Moekoetna.*

An administrator is at liberty to alienate or or encumber the whole estate entrusted to him.

The Supreme Court having collectively considered the proceedings in this cause, is of opinion that, by the settled practice, an Administrator is at liberty to alienate, and consequently to encumber the whole of the estate entrusted to him. The remedy of the right heirs to the deceased for malversation is against the Administrator and his securities, except in cases of collusion.

That the system of administration requires to be revised in this particular, there can be no doubt; but sitting judicially, the Court cannot deviate from a practice so thoroughly established. *D. C. Chilaw* and *Putlam No.* 4416, (J.)

October 31, (J. St. C.)

595—*Dayma Lebbe* v. *Wava Lebbe.*

A party who has consented to a reference to Arbitration, cannot afterwards dissent from the decision, merely, because it is against him.

It is regular for D. J. to sit as an Arbitrator.

When parties agree to be bound by any form of Arbitration, neither can afterwards dissent from the decision, only because it happens to be made against himself. The Supreme Court cannot, however, refrain from observing that the District Court sitting on an Arbitration with seven Assessors was a most irregular proceeding *D. C. Colombo, No. S. No.* 20941 (C.).

January 8 (J. St. C.)

596—*Omial* and other v. *Tamar* and others.

Whatever may be the real merits of this case, the conduct of the defendants in their delays and frivolous objections to the progress of the suit, is very blameable. Any opposition which the defendants had to offer against the plaintiff being allowed to sue in *forma pauperis* on account of her pecuniary circumstances, should have been made on their first *appearance*, and now comes too late. To allow such objections to be taken in succession upon failure of a previous appeal respecting the Proctors report, would be to contravene the rule requiring it to be made upon the appearance of the defendants, and to sanction litigious procrastination in the subsequent proceeding in *forma pauperis*. No satisfactory reason is even urged in the present instance for the delay, and the Supreme Court observes with marked disapprobation that the unnecessarily long Petition of Appeal of the defendants is drawn by the same Proctor who made a wrong report in the plaintiff's case, and he is accordingly disallowed his costs, thereon the interlocutory order of the Court below is *affirmed*.—[No. 3861,] *D. C. Walligama*, (C.)]

Any objection to sue in formâ pauperis should be made on the first appearance.

597—*Ackland Boyd & Co.* v. *Awadoe Lebbe.*

The decree of the Court below is *affirmed*, the majority of the judges of the Supreme Court having, upon the point being referred for their collective opinion, decided that a *parol* admission within the time limited for bringing the action, by the Ordinance No. 8 of 1834, is sufficient, under the proviso in the 7th clause thereof, to prevent the claim being barred by the plea of Prescription.—[No. 8976,] *D. C. Kandy*, (C.)

A parol admission is sufficient under the proviso in the 7th clause of the prescription Ordinance.

January, 16, (St. C.)

598—*H. A. Marshall* v. *David Perera.*

Landlord and Tenant.

It is directed that this case be required back,

A receipt not under seal, is not conclusive against the party giving it, but only a primâ facie evidence, which may be contradicted by parol.

in order that evidence may be taken on both sides as to the payment of the second quarter's rent in dispute. In general a receipt not *under seal*, is not conclusive against the party giving it, but only a *prima facie* acknowledgment that the money had been paid; and parol evidence may be properly admitted to shew, that, the giving of the receipt, was a fraudulent transaction, or, that the money was not paid (*Skaife* v. *Jackson*, 3 B. & C., 421; and 5 B. & A. c. 11.) In the present case it must be noticed that the second quarters rent not being due till June, it would not probably be paid in advance on the 11th April 1837, and still less without any express receipt for it in similar form as has been given for the first and third quarters' payments. Mr. *Marshall*, moreover on a question from this Court states, that the 11th April 1837, is the date of payment of the first quarter's rent, and in his own own hand writing; but he denies that the "35 rixdollars," immediately following the above date, was ever written by him, and charges, the defendant with inserting it. The above circumstances of suspicion and frand in this case certainly require strict investigation by examining the parties and taking evidence.

If a Landlord give receipt for the rent last due, it is to be presumed that the former rent has been paid.

Though the District Court has been in error in considering the plaintiff estopped by his receipts on the margin of the lease; yet, it is a rule of evidence, that, if a Landlord give a receipt for the rent last due, it is to be presumed in Law, therefrom, that the former rent has been paid; and the last receipt having been, in their this case, given expressly for the third quarter ending 30th September, the onus lies on the plaintiff to prove by satisfactory evidence, that the June, or previous quarter's rent, was not paid, and to rebut, the above presumption in Law in favour of the defendant. In case the plaintiff should fail to do so, he would only be entitled in this action to recover the fourth quarter's rent, which is admitted by the defendant to be still due, and owing to him.—[No. 21,839, *D. C. Colombo, No.* (C.)

599—*Mario Perera* and another v. *Diogoe Fernando.*

Debtor and Surety.

A Surety paying the debt, is entitled to stand in the place of the creditor.

It is a well established principle of Equity, that, where a surety discharges the debt of his principal, he is entitled to stand in the place of the creditor, as to all securities for the debt; and to have any benefit therefrom, and remedy, which the creditor had against the principal debtor. In the present case the defendant has retained the securities in his own possession upon paying off the debt, and the only main question is with whose money the creditor was paid.

The Cession need not be made at the time of payment.

It has not been the practice in this Colony, for a surety, on paying off the debt of the principal, to obtain "cession of action" from the creditor, and this Court has in a Jaffna appeal, No. 3193, dated 7th December 1834, decided that it was not necessary for such cession to be made at the time of payment, but that the surety might subsequently obtain it, even pending the suit against the principal debtor. If the defendant has not, therefore, already clothed himself with this express authority, he ought to obtain it now from the creditor.—[*No. 3787. D. C. Colombo.* (C.)

600—*Perera* v. *Pintappoo.*

Alienation of Service Parveny lands. Effect of Reg. No. 8 of 1809.

The Regulation No. 8 of 1809 is merely declaratory of what the Law was at the time it was passed,—it makes no alteration or new Law; and the Supreme Court has in former cases of this nature favoured alienations of such lands made before the passing of that Regulation, not only because the very necessity which existed for such a declaration shews that the Law as it stood was imperfectly known, but because, under the prior enactment of Governor North, such lands were considered alienable as private property.

Prescriptive possession of service Parveny lands.

Possession for ten years subsequent to the Regulation No. 8 of 1809, could not certainly be considered as giving a prescriptive title to the possessor, under the Ordinance regulating the prescription of actions; but the long enjoyment of the share possessed by the defendants and their parents since their mother's marriage, appears to have been prior to the said Regulation No. 8 of

1809, being for a period of between 30 and 40 years, which raises a presumption in Law of an old grant in their favour. The plaintiffs therefore, after such uninterrupted long enjoyment of this share by the defendants and their parents for so many years, cannot support this claim to take it away from them upon the simple proof of the land being service parveny, and of their being male heirs to *Juan*, who transferred it to his daughter on her marriage. No satisfactory reason is given for the plaintiffs' delay in instituting their present claim, and this Court always discountenances stale demands, when by the death of parties and witnesses, the real fact in issue cannot be so clearly known and proved.—[*No.* 3400, *D. C. Colombo* (C.)

601—*Siman Gomes* v. *Gabriel Pulle* and another.

The admission of one Co-Defendant does not bind another, if they put in separate answers.

In the present stage of the suit the plaintiff is only entitled to Judgment against the first defendant for 50 Rix dollars, being the value of the pair of bullocks, as admitted in the answer together with the cost of suit: the first defendant having admitted in his answer that the bullocks belonged to the plaintiff, and that he had sold them for 50 Rix dollars. If the bullocks were really of a higher value or worth 65 Rix dollars, as alleged in the libel, the plaintiff must, to recover their full value, prove the same,—it not being admitted by the defendants.

As regards the second defendant, the admission of one co-defendant does not bind another, if they put in separate answers; and Judgment can only be given against the second defendant who denies the plaintiff's libel, after taking evidence. The case is accordingly referred back to the District Court, with liberty to the plaintiff to proceed to evidence against the first defendant as to the full value of the bullocks, or against the second defendant generally. The costs of appeal of the second defendant must be paid by the plaintiff.—[*No.* 14,978, *D. C. Colombo*, (C.)

602.—*Abraham Appoo* v. *Andris Aponso*.

It is ordered that this case be referred back

to the District Court to allow the plaintiff to summon the Notary and attesting witnesses to prove his deed of sale, and to decide the case upon the evidence to be adduced on both sides. As the plaintiff named the Notary and attesting witnesses in his first List, and they appear to have been summoned on the 4th September, and on the Intervenients putting in their claim on the 6th September they were not named in the second list of witnesses filed by the plaintiff. The Supreme Court is inclined to give credit to the plaintiff's story, that he thought the evidence, to disprove the right of the Intervenients, was alone to be gone into; and that it was not necessary for him thereon to first substantiate his own title. There are few rules also less generally understood than that the plaintiff in ejectment must stand upon the strength of his own title, and not on the weakness of the defendant's. And to show that the error of the plaintiff in this instance arose purely from ignorance, it may be further observed that he made no application for any postponement on account of the absence of a material witness, nor does his previous conduct appear to have been dilatory; while, on the other hand, if the plaintiff's deed of sale be a true one, the defendant is guilty of fraud. Under such circumstances, this Court will, in favour of a plaintiff erring only through ignorance, and contesting his claim against primâ facie fraudulent parties, shew the above indulgence; but the plaintiff must pay the costs of this appeal, as well as the expenses occasioned by the attendance of defendant's and Intervenients' witnesses on the day of trial in the District Court,—in the same manner as if the case had been postponed on his application, owing to the absence of material witnesses:—[*No.* 14,326, *D. C. Colombo*, S. (C.)

Where the plaintiff has manifestly preceeded in ignorance, the S. C. will allow a new trial.

February 16, (St. C.)

603—*Arnis* and another v. *Emanis*.

The record of conviction in a criminal prosecution for assault is not admissible. Evidence, in an action for damages, by the complainants for

The Record of a conviction in a criminal prosecu-

tion for Assault, is not admissible in a civil action for the same assault.

The surgeon's receipt is not by itself evidence of his attendance.

the same assault, as the verdict being in part procured on the evidence of the complainants, it would be indirectly to admit their testimony in their own cause. *Roscoe* on *Evid.* p. 102. Indeed, it has been rejected even on the plea of guilty, 2 Phil. on *Evid.* 203, Ed: 7. The only evidence of the Surgeon's attendance and charge is his Bill and receipt, which is not admitted by the defendants, (who has filed a general denial), nor proved; and the evidence of the Secretary by itself is clearly insufficient to support plaintiff's claim. —[*No.* 3366. *D. C. Colombo,* (C.)

604—Juan Sameretue v. Asso and others.

An application to amend a written decree after a lapse of two months, disallowed.

This was an application by a Proctor to amend a written decree of the Court below. *Per* CARR J.—"It was the duty of the Proctor for the plaintiff to have seen whether the decree was correctly drawn out, in order to have appealed therefrom within the time limited, if the interest of his client required it. This Court will not after the lapse of two months attend to an application to amend a written decree, upon the vague recollection of a Proctor of what he understood the decree as to be pronounced. The plaintiff's Proctor has clearly in this case neglected his duty to his client, who is not to suffer therefrom, and he his accordingly disallowed his costs in this case". [*No.* 2705, *D. C. Matura,* (C.)

605—*Dinegame* and another v. *Lokoo Ettena* and others.

Seconday evidence of a Deed, when admissible.

Qu? as to the custom of Saffragam respecting a Beena husband's right to succeed to wife's property.

Before the secondary proof can be admissible of the contents of a Deed, the Court should have satisfactory proof upon oath if its having been surreptitiously taken by defendants (who plead that it never was made ;) or else of the loss thereof, and that due diligence had been made in searching for the same. The vague recollection of the District Judge or Secretary, not on oath, that an application was made about the loss of such a Deed by plaintiffs, will not supply such omission. In default of such proof to support this alleged Transfer by Deed, the custom of

Suffragam as to the right of surviving husband to inherit the landed property of his deceased wife, by Beena marriage, should be ascertained, *Doloswelle Dessawe*, and the other Chiefs, appearing to have expressed opposite opinions thereon as stated in Mr. Sawyer's Digest. The adoption of the second plaintiff would also probably vary that right in the present case.—[*No.* 1643, *D. C. Colombo*. (C.)

606—*J. W. Huskisson* v. *Walker* and another.

Action for Defamation.

Where two or more persons conspire unlawfully to injure another, all the acts of one in furtherance of the common design, may be given in evidence against the other.

Though the first defendant is alone charged with writing the letter of the 16th day of June 1837, yet both the defendants are charged expressly with having addressed the letter of the 18th day of June 1837 to the plaintiff; and also in pursuance of their design, to injure the plaintiff's honour, of having caused *copies* of the alleged libellous Letters to be made and published, and of having moreover spoken scandalous and defamatory words against the plaintiff. If the second defendant has been in any way concerned with the first defendant in advising, dictating, writing, delivering or publishing such letters, or copies thereof, (which is not denied,) he his properly made a co-defendant in this action; and where two or more persons conspire unlawfully to injure another, all the acts of one, in furtherance of the common design, may be given in evidence against the other.

Form of libel in such a case.

The Libel in this case however is very carelessly drawn. It should have commenced with an express charge against *both* defendants, of combining and confederating together for the unlawful purpose alleged, and it should more explicitly set forth when, where, and to whom copies were read and published, and what were "divers" libellous word or expressions used; and when, where, and to whom uttered; otherwise the defendants can never be prepared to answer these latter charges, or have notice to what circumstances they would have to call their evidence to rebut that adduced by the plaintiff.—[*No.* 7285, *D. C. Trincomalie*. (C.)

February 27, (C.)

607—*Silva* and another v. *Dissa* and another.

Admissions in an answer do not operate as an estoppel except in certain cases; and may be explained by evidence.

The defendants should not be concluded, or estopped by their admission in their Answer referred to, as the plaintiffs cannot be considered to have been induced by it to alter their condition; nor was the fact in dispute between the parties to this case, or any decree made against the defendants on the points in that former suit. The general rule as to *third persons*, is, that a party is not bound by, or estopped by such admissions, but is at liberty to prove that the same were mistaken or untrue. The defendants might possibly be able to prove that they were misled by fraud, mistake, or ignorance of facts to make such admission, and prove by general evidence their title. Though the defendants be not estopped or concluded, the admission is strong evidence however for the plaintiffs, and will require very satisfactory proof to rebut it.—[*No.* 2503, *D. C. Amblangodde.* (C.)

608.—*Naina Lebbe* v. *Coste Moopo.*

Rights of claimants to property seized in execution.

The 6th clause of the Regulation No. 13 of 1827 declares, that, where property seized under execution is claimed by third parties, the Court shall call the several parties to establish their respective claims; and the constant practice has been for the claimants, upon giving security, to institute proceedings to try the respective right. The defendant in the present suit has never abandoned his claim to the property in dispute, which must be considered constructively, as being still *seized*,- the re-possession being only granted to the plaintiff conditionally, upon the security given. The defendant moreover should in the first instance have been called upon to prove his title, the regulation declaring that the possessor is to be, *prima facie*, considered as the owner. [*No.* 2339, *D. C. Colombo.* (C)

March 6, (C.)

609--*Ponsiano Siman* v. *Mrs. S. F. de Breard.*

Where a mortgage Bond was executed on a

Sunday, and not numbered, nor duplicate copy therof filed in the District Court, *held*, that these were no grounds to declare the instrument, upon this plea *invalid*. The 4th and 6th clauses of the Ord. No. 7 of 1834 certainly require this Deed to be executed in duplicate, and the duplicate copy to be filed, under a penalty upon the Notary; but they do not declare the instrument *invalid* in default thereof, otherwise, proof of the duplicate having been executed and duly transmitted, must be always adduced, similar to evidence of *enrollment* of bargain and sales &c, required by the Statute to render such deeds admissible.

Execution of a Deed on a Sunday, and the failure to number and to file the duplicate copy of a Bond do not render the instrument invalid.

The above facts are however strong circumstances of fraud, which, if unexplained by evidence at the trial, must be considered as tending to throw discredit on the instrument, though the plaintiff must not be *estopped* thereby from proving, if he can, the due execution of the Bond by the attesting witnesses.—[*No.* 5036, *D. C. Colombo.* (C.).

March 20, (J.)

610—*Mudache* v. *Markar*.

In this case the plaintiff originally alleged that the property in dispute was the *modicum*, or hereditary property; but this (as is admitted by the District Court) she has not proved. On the contrary it appears from the testimony of the majority of her witnesses that these were acquired by herself and by her husband since the marriage, and therefore it falls into the community. That the husband is the sole administrator of the common property, and is at liberty to encumber it at his pleasure, during coverture, is a well established principle. Had this property, indeed, been parveny or hereditary, it might have been advisable to have ascertained whether there is any local custom at Batticaloa which secures such property to the wife, *when there is no marriage contract*; but under the circumstances the enquiry is unnecessary.—[*No.* 3473, *D. C. Batticaloa.* (J.)

In Batticaloa, property acquired during coverture comes into community, and is under the sole controul of the Husband.

611—*Parpadian* v. *Coeamaroe*, and another.

The defendants, in this case, obtained writs of

No publication of sale. Proof of.

of execution in a former suit, and caused the plaintiff's property to be sold under it. The present action was brought to recover the property sold in execution from the defendants; and *Per* JEREMIE J.—The question more immediately before the Supreme Court is simply whether the sale of plaintiff's lands, was actually published. Eight persons, all neighbours, including the two Police Vidhans, the Notary, and the tom-tom beater, who should have published the sale, all distinctly swear, that to the best of their knowledge and belief there was no publication. They swear to it as distinctly as a negative can be sworn to. It is said that some of these witnesses are not entirely above suspicion, principally from their being relatives, which is no doubt true; nor, in cases of this nature, can it ever be otherwise: but surely in the very populous neighbourhood of *Copay*, some respectable witnesses might have been called, who had heard the publication, or seen the notices affixed. One single witness deposes to these facts and he, as proved by the record attached to the Petition of Appeal, is convicted of prevarication. The decree of the Court below is in consequence reversed, and as it appears that the amount of the original debt and costs is deposited in the District Court, it is ordered that the plaintiff be forthwith reinstated in the property now in dispute, and she is hereby quieted in the possession of the same as fully and effectually to all intents and purposes whatever, as if no sale thereof under the writ of execution No. 1676, had ever taken place.

It is not an immaterial circumstance that the present action was entered within twice twenty four hours after the sale.—[*No.* 2136, *D. C. Jaffna.* (J.)

March 27, (J.)

612—*Cornelis Fonseka* and another v. *Don Andris* and another.

This in an action *de condictione indebiti*, or for the restitution of money actually paid: the whole

proof falls therefore on the plaintiffs, for their own admissions make out the defendant's case. The defendants are Cinnamon-planters; the plaintiffs apparently Native Merchants. The transaction took place in September 1837, when the goods were, as is sworn to, examined, tested, weighed, delivered, and paid for;—and that they were actually delivered and paid for is admitted by the plaintiffs. But they say that this sale was conditional. If oral testimony of so unusual and improbable an engagement, as a covenant of warranty for merchandize of this description, be admissible at all, it is perfectly clear that nothing but the most convincing proof could induce the Court to credit it; and here the evidence is not only very contradictory, but in many other respects doubtful, whilst the witness most worthy of belief produced by plaintiffs, rather uphold the defendant's than the plaintiff's case. The decree is therefore reversed, and plaintiff's action dismissed without costs. [*No.* 19,572, *D. C. Colombo. S.* (J.)

Action for the restitution of money actually paid. Evidence.

April 17, (J. C.)

613—*Tikieraale* v. *Kiry Menicka.*

The object of the Proclamation against forcible dispossession, was to prevent violence and breaches of the peace, and to compel parties disputing to have recourse to a civil suit to settle their respective claims, instead of taking the Law into their own hands. All that the District Court ought to enquire into upon the criminal proceedings is, whether there has been a *forcible* ejectment of a party *quietly in possession*; it never investigates into, or can finally decide upon, the respective titles of the parties, but leaves the claimant to his civil action of Ejectment. For instance if A and his brother were joint proprietors of a field, and A bequeathed or sold his undivided moiety to B, but the brother retained exclusive possession of the whole field; if B *forcibly ejected* him from the half, he would be punishable under the Proclamation, though he has a better title to it, and, by a civil action, would be put in possession thereof.

Proclamation of 5th August 1819 against *forcible* entry. considered.

The plaintiff in this action is following a legal remedy which he ought to have had recourse to in the first instance; and he was punished under the criminal proceedings only for *ejecting by force*, instead of bringing this action to recover possession.—[*No.* 3682, *D. C. Kaigalle*, (C.)

April 24, (J. St. C.)

614—*Cander* v. *Ramasamy*.

By the Law of *Jaffna*, a son is not liable for his father's debts, unless the latter has left property, and the son has taken possession thereof.

The plaintiff and appellant, in this case, is a creditor of defendant's deceased father, and he claims the amount of his debt against the son. He alleges that the son inherited property from the father; but, he adds, whether he did or not, the mere circumstance of his being his son renders him liable for all the father's debts.

In this demand there can be no doubt that he is borne out by the text of the *Thesewalleme*, which distinctly states that, "although the parents "do not leave any thing, the sons are never- "theless bound to pay the debts contracted by "their parents;" and again, "although the sons "have not at the time wherewith to pay the said "debts, they nevertheless remain accountable for "the same."

The District Judge has however thrown out this action on the ground that, "there is no "proof adduced that the defendant inherited or "received any of his deceased father's property; "and that, in fact it appears, that he died leav- "ing no property, as per Report of the Headmen "made on the writ which was proved by plaintiff "himself. Such being the case it is indeed hard "to make the defendant sacrifice what he has "acquired, with his own labour and industry, "for his father's debts. That although the Coun- "try Law directs that the sons are to pay the "father's debt, it at the same time declares that "it is a hard one. Under the foregoing circum- "stance and consideration and with the opinion "of the Assessors, it is decreed that plaintiff's "claim be dismissed, and he do pay defendant's "costs of suit."

The Supreme Court, whilst it also admits the hardship of the law, would not have felt warranted in overlooking it on that ground alone; but as the *Thesewalleme* is, in fact, nothing more than a Report of the customs and usages of the Country, it conceived that it might occur in this as it often has in other instances, that the usage admitted of modifications which softened the rigour of the general principle, and reconciled it to the rules of natural equity.

For the purpose of ascertaining this point it directed three special assessors, well acquainted with the Malabar usages as practised at Jaffnapatam, to be selected; and it further proceeded to examine several of the most experienced among the native inhabitants on the custom. The following questions were then put to the latter.

First,—A Father dies in debt leaving no available property. Are his sons liable to discharge his debts from the property accruing to them from their own industry: and if so, are they also liable to personal arrest for such debts?

Second,—Are lands given in dower to a daughter liable to these debts?

Third,—Was there any ancient, or is there any known form, by which, after the decease of the parent, the sons, by renouncing to his inheritance, could exempt themselves from this liability?

The answers were as follows:—

Three of the witnesses declared,

That the sons were liable in person and property.

That lands given in dower to the daughters were not; and that they did not know, nor had they heard of any form by which the sons could exempt themselves from this liability.

Mr. Mootiah, the District Judge, who was the fourth witness, gave the same answer to the two first questions; but to the last he answered that he had heard of instances, and was himself aware of one, in the time of *Mr. Dunkin*, when, on the sons coming forward and repudiating altogether

their father's inheritance, they had been exempted from the payment of his debts: and this he understood to be the present Law. He also quoted an instance in the High Court of Appeal of about ten years standing, in which the sons had been exempted from liability on the grounds now taken oy the District Judge, ("the extreme hardship of the Law"); but, he added, that this precedent had never been considered Law, and had been over-ruled by the subsequent practice.

The three Assessors concurred entirely in opinion with *Mr. Mootiah*, and the first Assessor stated that he had a full knowledge of the case in *Mr. Dunkin's* time, to which *Mr. Mootiah* referred, which he considered consonant with the usage.

It thus appears that the above passage in the *Thesewalleme*, though correct as far as it goes, is nothing more or less than a rule of the Civil, or rather Roman-Dutch Law,—the common law not not only of Jaffna, but throughout the Maritime Provinces—by which law the heir is responsible for the ancestor's debts, unless he had repudiated the inheritance, which he is at liberty to do whenever he is sued for any such debt; except he should, in the mean time, have intromitted or done any of those acts which show that he intended to appropriate the inheritance to himself.

Letters of Administration have superseded the application for the Benefit of an Inventory.

Nor has this Law been in any way rescinded or modified up to this time. Formerly, indeed, where the heir entertained a doubt whether the estate could discharge all its liabilities, he was at liberty to apply for the Benefit of an Inventory, and now he applies for Letters of Administration. The latter form, as in many respects the more convenient and consonant with our present judicial institutions; having in effect, superseded the former; but this has not done away with the doctrine of intromission, or removed the responsibility of the heir. Letters of Administration are only requisite *for his protection*, and they are also requisite when a stranger, such as a creditor, or others having claims upon a vacant estate,

are desirous of obtaining a title which will warrant them in recovering the assets and managing the property.

On these grounds the decree of the District Court is affirmed, unless the plaintiff shall undertake to prove that the defendant has appropriated to himself any portion of the property of his deceased father, without having obtained Letters of Administration. Should the plaintiff not undertake this proof, and should his debtor have actually left any property, the said plaintiff will still have his recourse against such property, on taking out Letters of Administration to that estate.—[*No.* 1531, *D. C. Wadimoratchy*. (Coll.)

615—*Assena Lebbe* v. *Sinne Markar* and others.

An heir who takes possession of the property, renders himself liable for the debts of the intestate.

It being clear, in this case, that the property in dispute , whether liable to the plaintiff's claim or not has been taken possession of and appropriated to their use by defendants as heirs to their uncle, the Supreme Court is of opinion that Letters of Administration are unnecessary, the defendants having rendered themselves responsible for all the liabilities of their ancestor.

In the case from Wadimoratchy No. 1531, the principles by which the Court is guided are in a great measure laid down, but in further elucidation of its sentiments it will now observe that the practice of granting Letters of Administration, peculiar to the English Law, has never extended in England to real estates. A contrary rule has however sprung up in Ceylon, and an extension has been given to this practice very recently, by which it would seem to have been understood, in some parts of the Island, that Letters of Administration are absolutely necessary in all cases whatever of real or personal inheritance *ab intestato*. This course it is understood is considered called for by the 27th section of the Charter; but even in giving the very amplest construction to that clause, and taking the word *Estates* in its broadest sense, a construction however contrary to the ordinary and accustomed

one, for the words are "estates and effects," and therefore the former expression is limited by the latter, still there is nothing in the clause to make it incumbent on all parties to take out these Letters,—it merely grants District Courts, and District Court *only*, full power and authority to grant them when they ought to be granted. The original jurisdiction of the District Courts is rendered *exclusive*, evidently because previously they were sometimes also granted by the Supreme Court, but the words are not imperative, they merely empower and vest a discretionary authority in the District Court to make such grant.

It is also said real property is by the Civil Law assets for the payment of debts, but where there are no debts, or where the right heir undertakes to pay the debts, there is and can be no no good reason for burthening him with new and unaccustomed forms and thus increasing his difficulties. The heir is, by Law, unless he has repudiated, the Administration to the estate, he can as such maintain at once as plaintiff or defendant any action concerning it; and where he is not solvent, or the estate is not likely to be secure in his hands the present Law has always afforded an adequate remedy by *then* authorizing a separate administration, if applied for, within five years from the decease of the intestate: and it is to this that the law Dig. 42. L. 1. § 13. erroneously quoted, as referring to the division of estates in the old case No. 2364, applies ; —as many be seen in the *Censura Forensis* L. 4. c. 11. § 13. The effect of this new practice if pushed beyond due bounds, would be pernicious in the extreme. Already have settlements of thirty years standing been called in question, whilst by rendering real property always convertible into money at the mere pleasure of an Administrator, all hereditary predelections for ancestral estates, —a feeling existing as intensely here as in any part of the world, were destroyed. These inconveniences are felt even when the assets of the estates are forthcoming ; but in other instances

the estates have disappeared altogether, they have been sold, their value squandered away, and a remedy against an Insolvent Administrator and an Insolvent Security is all that remains to the right heirs.

Nor is even this all, one anomaly has led to others, and it has followed as a corollary from the first mistaken principle, that as, until Letters of Administration are actually taken out, no action will lie; persons have taken possession of estates, enjoyed and disposed of them, without observing this form; and no sufficiently available remedy remains against them, for the first step required from any one having claims on estates so possessed, whether creditors or heirs, is to compel *them* to take out administration, which they cannot obtain except on giving security by themselves and others to double the value of the whole estate, much of which the wrong doer may have already dissipated a step so onerous that few are found to take it, and the practical result has already too often been that the intruder has been held perfectly harmless in his wrong doing. Now by the Law of England a person acting in this manner is an *Administrator de son tort*, and to the extent of the assets liable for all the debts of the deceased; whilst the Civil Law goes further and renders him liable, not only to the extent of the assets, but to the full extent of the liabilities however they might exceed the assets; and this he is by the laws of the both countries responsible for immediately, and on mere proof that he has intromitted.

Nor are these objections entirely of recent date. So far back as 1822, though then the practice of taking out administration was by no means so frequent, for, in 1834, (see judgment Supreme Court 14th May), it had scarcely extended to Caltura. The Court in pronouncing its judgment observed as follows:—"The taking out of "Administration to *Martha* seems to have created "much of the difficulty of this case, and this "difficulty shows how very cautiously a branch of "a totally different system should be transferred to

"any code of Laws; the Dutch Roman Law, not-
"withstanding what the Provincial Judge has been
"pleased to propound, knows nothing whatever of
"administrations, which are derived wholly from
"the English Code. How an administration
"to *Simon* could operate at all upon the rights of
"the Respondent and his wife, vested absolutely
"by the death of *Martha*, I can in no wise conceive;
"or why it should have been thought necessary
"by *Simon* to take it out. *Indeed the whole*
"*subject of these administrations in the subordinate*
"*Courts is involved in a preplexity, which it would*
"*be a matter of public utility to have explained by*
"*competent authority.*"

And now that it has begun to be more generally insisted upon by District Courts, it is not too much to say that this practice had already become the most serious grievance connected with the administration of justice, of which the mass of the population complained. But it has been urged that by these means the rights of absentees, and of the actual parties to the suit against the absentees, are protected. This may be a sufficient reason to induce the parties themselves to apply for administration, when the inheritance is not already duly represented; but it is none for *compelling* them to do so. The principle is equally novel and untenable, that, before a party can maintain his own rights or defend his possession, he is to give security that he will at his own peril, cost and charge, defend the interests of the absentees, and others who do not think fit to come forward and defend themselves; nor may it be, on the other hand always perfectly fair and just towards these absentees that their interests should be thus vicariously disposed of.

The power vested in the District Courts under the Charter being purely discretionary, and this practice to the extent now noticed being not only unfounded in law but inequitable, it follows that it cannot be affirmed by the Supreme Court, which conceives that the old established Law of the Island continues in full force; and that, whilst District Courts are "*empowered*" to grant admin-

istration in any case, subject of course to appeal, they will exercise an undue discretion and lay their judgments open to reversal if they ever grant them when the rightful heirs, being solvent and of full age are willing to accept, or when such rightful heirs have *de facto* accepted the estate with all its liabilities. This will not prevent their being still grantable, as stated in the other case this day determined, whenever the estate is actually vacant or unoccupied, or whenever the rightful heirs apply for them for their own protection, or to make out a title,—provided they do so before they have actually accepted.

The decree is therefore set aside, and the District Court is to pronounce its opinion on the merits. It would be very advisable before it does so, that it should examine both the parties as to any deeds that either may have in his possession, relating to this property.—[*No.* 1959, *D. C. Manaar.* (Coll.)

616—*Brook* v. *Jones.*

No action is maintainable on a lottery ticket.

The question in this case is simply whether a party can recover upon a private Lottery Ticket, and the Supreme Court is of opinion that he cannot. Unsanctioned Lotteries are a species of gaming prohibited by Law. Such is the express opinion, among other authorities, of *Vinnius*, in which the Court concurs. The decree of the District Court is therefore reversed, and plaintiff's action dismissed, but without costs.—[*No.* 7024, *D. C. Trincomalie.* (Coll.)

617.—*Caylan* v. *Chinnepulle* and another.

Husband and Wife. On a Judgment against husband and wife, the wife's person cannot be taken up.

A creditor, on a Bond entered into by husband and wife, can only take out execution against the person and property of the husband; and against the property, but not against the *person* of the wife, during coverture.—[*No.* 4086, *D. C. Batticaloa.* (Coll.)

618.—*Bastian Fernando* and others v. *Dona Francina.*

The possession of a joint

The Supreme Court has Collectively decided that the possession of one joint-heir is not *adverse*

heir is not *adverse* to the other.

to the other, so as to vest a prescriptive title under the Ordinance in ten years.—[*No.* 3025, *D. C. Colombo.* (C.)

619.—*Dingery Menicka* v. *Arachigey Vidahn.*

In the Kandyan Territories, as elsewhere, a married woman cannot sue or be sued alone; and a Judgment against her is void.

This case having been considered Collectively along with *Badulla, No.* 7482, and *Madawelletenne No.* 1461, and it having been determined that in the Kandyan Territories, as elsewhere, a married woman can neither sue nor be sued alone; and it appearing that the plaintiff in this case is a married woman, and that neither her husband nor any *curator ad litem*, is a party to the suit: it is adjudged that the proceedings are null and void, and the case, is accordingly dismissed.

The District Judges are required in every case to direct that it shall be recorded in the libel, answer, or petitions of intervenients whether the parties are married or unmarried, minors or of full age.—[*No.* 7830, *D. C. Badulla,*—Also *No.* 7482 *D. C. Badulla* and *No.* 1461, *D. C. Madawelletenne.* (St.)

620—*David Perera* and another v. *Carolus Perera* and others.

One tenant in common cannot prescribe against his cotenant under thirty years.

The point before the Court in this case was as follows: viz; Is an action by a coparcener or tenant in common who has not taken possession, against his caparcener or co-tenant in possession, for his share of the common estate, barred by a prescription of ten years, or any less term than thirty years?

Judgment—The question thus stated resolves itself in the first instance into this,—is the possession of the co-heir or co-tenant an *adverse* or independent possession, for, if it be not so, the above section clearly does not apply; but if it does not, no other part of the Ordinance can; and all preceding local Regulations on the same subject, are distinctly repealed by that Ordinance; so that reference must thenceforth be had for the decision of the point, to Roman-Dutch principles.

The Court is of opinion, that, by the known Laws of all Countries, English and Roman, as well as the modern Laws, derived from the

Roman, including expressly the Roman-Dutch, the possession of a coparcener or co-tenant is not an *adverse*, but a *concurrent* possession; the original title is the same, and the possession of one is the possession of the whole: so that the one is neither adverse to nor independent of, the other, in the only sense in which the latter word can be used in an Ordinance on Prescription;—for, it is impossible to make out the title of the one, without at the same time, making out the other. There can be doubt that the possessor entered as a coparcener,—his coparceners having *then* an equally good title, and in all questions of prescription of real estate, the tenure under which possession *commenced*, is held to have *continued* until the possessor proves that it has been changed or introverted. The possessor is therefore never called upon for his title, until a title is proved against him, and then he must make out a better title by something more than ten years possession. To establish, in short a ten years prescription, the possession must have commenced in good faith; it must therefore be founded on such a title as is entirely inconsistent with the claimant's right: so that both titles cannot be valid at the same time and consequently the possession of the one must be irrĕconcilable with the right of the other. But though these principles, taken generally, are beyond dispute, it is contended that the following words in the above section of this Ordinance show what was intended to be an "*adverse*" possession under that Ordinance:—("that is to say, a possession unaccom-"panied by payment of rent or produce, or per-"formance of service or duty, or by any other "act by the possessor from which an acknowledg-"ment of a right existing in another person "would fairly and naturally be inferred.") The Court cannot but consider such definitions inserted in a parenthesis, as given by way of example *ad demonstrandum*, and not by way of limitation, the passage *enacts* nothing: it merely designates a few instances, concluding with words so vague and general, as to leave the definition exactly as it stood at Common Law.

Then, though the period of prescription, whether of five, ten, or twenty years, or of any less or longer time, varies in different Countries, and is universally regulated by positive Law,—(Cujas quotes several hundred of these periods ranging from a day to a century, as existing in the Roman Law alone),—yet, the principles upon which such questions ought to be determined are matter of doctrine : they are equitable rules common to all countries, with which, no doubt, every Legislature may deal, and occasionally will deal; but with which a Legislature will never be presumed to have dealt by mere inference, nor indeed unless the terms it has used are terms of enactment express and distinct. This rule applies with peculiar force to the present subject. Most of the land throughout this Island (garden or field) is occupied by others than the proprietor,—by planters, by cultivators, by tenants,—and these several holdings are occasionally handed down from father to son, not only for a few years, but actually for centuries. Can it be contended that such possessors, holding under a title entirely precarious, are, because they fail for ten years in paying their annual redditus, to become by such their laches the usurpers of the soil? That they are to throw out their landlords, and changing their own title, to become incommutable proprietors, and that this benefit is to commence accruing to them from the first day they failed in their engagements?

Then, when a tenant does actually pay his rent the receipt is in his hands. The proprietor has no written proof of the payment; so that, whether such holders have paid or not, he would, if this opinion were allowed to prevail, incur the risk of being deprived, however clear his original title, however clear the ground of his tenant's occupation, not only of his income, but of the fee simple of his estate: except he could at all times adduce oral evidence of an actual payment within the ten years preceding. A fraudulent trustee again would be protected by ten years continued misconduct. The construction endeavoured to be put

on the Ordinance embraces all these cases as well as the case under consideration. It either applies to all, or it applies to none. It has been repeatedly maintained that it applied to all; but the established jurisprudence of the Court in accordance with every well known principle of Law, good faith, and equity, has ruled that it applied to none and that an adverse possession is still, what an adverse possession was at Common Law. The plea for the opposite opinion is that it tends to secure titles; but titles so easily won, may be as easily lost: such titles are scarcely worth having. To give value to property a title must not be easily obtainable by fair means, but lost with difficulty by dishonest means, or the very object in obtaining any title is defeated. Nor are the dangers above stated merely imaginary. A tenant under a Notarial lease in due form has already been known to claim the fee simple in the soil, mainly on the ground, that he had not paid the rent he unquestionably owed for ten years, in which plea he was certainly borne out by the construction attempted to be put upon this Ordinance, for "no *act* had been done by the possessor *within the ten years* from which a title could be in any way presumed"; and if this *act* may be done *upwards of ten years before*, then the original entry *as an heir* is an act from which the right of all persons in the same right not only "*may*" be "*fairly and naturally*," but must necessarily be presumed; and the attempt by planters and cultivators to usurp the fee simple are very numerous. See among others, cases *Caltura* 4944, 2889, and *Matura* 2343.

What then is the Common or Roman-Dutch Law? The Court, perfectly acquainted with the decision in case *No.* 2364 before the High Court of Appeal, would question the correctness of the judgment then pronounced with great hesitation; for few judicial opinions does it entertain so high a respect as for *Sir Hardinge Giffard's*. He has, however, with his usual straight-forwardness of purpose and disposition, quoted the authority on which he relied; and there can be no doubt that,

according to the sentiments of all Commentators on the Roman Law, the Dig. *Lib.* 42. *Tit.* 6. § 13. so quoted and relied upon by him has no reference to this point. Nothing short of this uniformity of opinion among authors could have induced the Court to confide in its own previously formed judgment, thus opposed. The applicability of this quotation is not however a point of doctrine but of *fact*, and upon this fact it entertains not a doubt. To multiply citations from any large number of Commentators were superfluous. The Court will limit itself to three, viz: the principal among the more ancient writers, Cujas; the principal among the moderns, Pothier; and one of the first—the most familiar in these Courts among Roman-Dutch writers on Civil Law,—Van Leeuwen's *Censura Forensis*; and this author is selected in preference, as it is probably owing to a mistranslation of a passage in his more popular work "The Commentaries," that the doubt suggested itself.

The Law quoted by *Sir Hardinge Giffard* is as follows;—"Quod dicitur post multum temporis separationem impetrari non posse, accipiendum ut ultra quinquennium post aditionem numerandum separatio non postuletur." The construction which the Court itself puts upon this Law has been explained in its judgment of this day's date, *Manaar*, 1959; it refers, not to a division of common property, but to the right possessed by creditors of insisting on the estate of a deceased person being kept *separate* from that of his heirs when the latter are insolvent, or nearly so, which by this Law they are at liberty to claim for five years, by which means they prevent a "*confusio*" or merger of the debts and credits of the two estates.

So Cujas observes;—"Ultra quinquennium post aditionem hereditatis *creditores* defuncti separationem non impetrare." Pothier:—"Est superioris "Tituli sequela hic Titulus; in quo agitur De "Separatione Bonorum, quam impetrant *creditores* "defuncti, cujus hereditatem adivit is cujus bona "proscribuntur;"—*Pothier Pandects, Lib.* 42. *Tit.*6.

And Van Leeuwen in *Lib.* 4. *cap.* xi. § 23. (whilst quoting the same Law in his margin *L.* 42. *Tit.* 6. De Separationibus,) comments on it as follows : "Aliud porro privilegium est, quod *creditori* contra debitoris sui heredem suspectum competit, etiam eum qui solvendo non sit ;" and then he proceeds to show that a quinquennial prescription is a bar to this privilege by virtue of the passage, quoted by *Sir Hardinge Giffard,* which forms § 13. of this *Title* 6.—But superior in authority to all Commentators, what is the first Clause, § 1. of this very *Title* 6. *Lib.* 42. in the Digest itself? It distinctly explains the sense in which the word "*separatio*" is used throughout. It states "solet autem separatio "permitti *creditoribus*; ut puta debitorem quis "Sejum habet, hic decessit hæres ei extitit Titius; "hic non est solvendo patitur bonorum venditionem: creditores Seji dicunt bona Seji sufficere "sibi, creditores Titii contentos esse debere boni "Titii, et sic quasi duorum fieri bonorum venditionem; hic est igitur æquissimum, creditores "Seji desiderantes separationem audiri ; impetrareque a Prætore ut separatim quantum cujusque creditoribus præstetur," which separation this Law proceeds to say (*Section* 13.) must be applied for within five years.

What then are the passages of the Civil Code applicable to this subject, and what the term of prescription settled by that Code ? Those applicable to this subject are the Laws, "de communi dividundo familiæ erciscundæ, et de petitione hereditatis," ff. 10. *Tit.* 3: ff. 10. *Tit.* 2: ff. 5. *Tit.* 3: and to all these the same period of prescription by the Roman Law applies, viz: thirty years. So Cujas ;—"Secundum, est de prescriptione "30 annorum, qua tolluntur actiones personales "et mixtæ, veluti petitio hereditatis, communi "dividundo, familiæ erciscundæ;" so that even the *prescriptio longi temporis* (10 years among persons present, 20 if absent,) did not apply to either.
See also the Code, *L.* 7. *Tit.* 40. § 1. By the Roman-Dutch Law however it would appear that the rule is not so clearly established. Some

authorities favor the Roman term; others maintain that the period is one third of a century, or thirty three years and four months. This in the present case is perfectly immaterial, and the Court does not therefore feel warranted in going into this last point. It is true that by the *present* English Law the right of a coparcener is barred by twenty years prescription, but it required a very recent Act 3. and 4. Wm. 4. C. 27, to effect this, previously it was not barred by any lapse of time whatever, which is also the case by the Roman Law when either of the coparceners *actually in possession* claims a division, for the right to sever a common tenure is unprescriptible, and it is to this the Law *L.* 9. *Cod. Commun. utriusque Judic.* (iii. 38.) applies.

The Court deems it right to conclude with the following observations. If any sale or *bona fide* transfer by legacy or gift had taken place in favour of respondents, so as to produce a change in the title, and 10 years had expired from the period of such change to the date of the action, no doubt the appellant's right would be affectually barred. Here indeed there is a legacy, but ten years have not expired from the date of that legacy. Nor would the Court have it supposed that, though in its opinion nothing short of a thirty or thirty three and one-third years prescription is an actual bar to this action, the lapse of time whether of ten years or more, or even less, ought not to be taken into consideration as a *fact* tending to induce a presumption that a division has really taken place, on the contrary very little additional proof (as for instance of a separate holding of any portion of the property) will easily induce it to presume such division. All that is before it,—all that it definitely rules, is,—that a possession by coparcener, or other tenant in common, is not an adverse possession; and that neither the prescriptive Ordinance, nor the Law, *L.* 42. *Tit* 6. § 13. apply to such cases,—which, consequently are not barred by a less prescription than thirty years.

The decree of the District Court is therefore

reversed, and the case referred back for further proceeding, without costs.—[*No.* 19,620 *D. C. Colombo*, S. (Coll.)

May 1, (O. J. St.)

[The Hon'ble Sir ANTHONY OLIPHANT was sworn in as *Chief Justice of the Island of Ceylon.*]

May 20, (O. St.)

621.—*Fernando* v. *Laxa Mudianse* and others.

It was *held*, in this case, that the privilege of Kandyans does not extend to the Regulation of the Law of Evidence, either in matters Civil or Criminal, by their own customs. The Law of England, in as far as it is applicable to the Laws of this Colony, is to be followed, in rejecting or admitting testimony.—[*No.* 1164, *D. C. Colombo*, (St.)

The privileges of the Kandyans do not extend to the Law of Evidence.

May 27, (St.)

622.—*Ameresekeregey Carolus* v. *Salmon Perera.*

The statement of parties on mutual examination forms no part of the pleading, and the pleading of the defendant does not appear to the Court to bear the interpretation put on it by the District Judge. The doctrine of the District Judge that erroneous or defective pleading ought not to deprive a party of a right is altogether fallacious. He is to decide on the case *as pleaded* and has no right to consider any averments not *regularly* before him.—[*No.* 20,179, *D. C. Colombo*, S. (S.)

Pleading. Effect of examinations of Parties.

June 19, (O. J. St.).

623.—*Ohlmus* v. *Groeff.*

The Court is unanimously of opinion that by the Dutch Law as administered in Ceylon under the Dutch Government, a father was bound to apply to the *Weeskamer* for authority to receive all legacies left to his minor children, as their guardian. It is also unanimously of opinion

A Father is not entitled to receive a legacy left to his minor child, without the authority of

the S.C., which has in this respect succeeded to the powers of the *Wees kamer*.

that, at the date of the death of the testator in this case, the Supreme Court possessed all the powers which had been formerly vested in the *Weeskamer*, and that the father of the wife of the plaintiff, therefore, was not entitled to receive the legacy as her guardian, without authority from the said Court.—[*No.* 16,782, *D. C. Colombo*, S. (Coll.)

June 26, (O. J. St.)

624.—*Koelman* v. *Fernando*.
Pedro Perera, Intervenient.

Accord and Satisfaction how pleaded and proved. Intervenient's right to call Evidence.

The plaintiff claimed certain property of the defendant by purchase, and he produces his Deed of purchase and several old bonds. The defendant alleges that he has discharged these bonds by means of payments in money and in goods, *Per* JEREMIE J.—" This fact is however inconsistent with the passing of the purchase deed; and although satisfaction and payment as well as a set-off may, by the established practice of this Island,—a practice long since judiciously adopted from the English Rules of Pleading and Evidence, and now in effect ratified by the Ordinance relating to Evidence,—be pleaded and proved in discharge of a bond or other specialty, still the payments must be notified specifically, and must be of a liquid nature. The Court therefore very properly rejected, inasmuch as regarded the defendant, the proof of payment tendered so loosely by him.

" But a new party has intervened who states that the property sold to plaintiff, and now in dispute, was, at the time of the sale, under sequestration for a debt due to the Government, for which debt the Intervenient was defendant's security; and that defendant and plaintiff are, or were at least at the time of passing the sale and the bonds, acting jointly, in collusion, for the purpose of defeating the Intervenient's undoubted right,—nothing being in fact actually due by defendant to plaintiff. It is shewn that the property was under sequestration, and the District Court has, accordingly, cancelled the sale; but it has given the plaintiff a right of priority over

over the Intervenient upon this property for the amount of the original bonds,—having thus rejected the Intervenient's offer to prove that the whole transaction was nothing more or less than a covert arrangement to protect defendant's property from the claims of his *bonâ fide* creditors, viz: Intervenient and Government. In so doing the Supreme Court conceives that the District Court has gone too far. The Intervenient's plea is perfectly regular and he ought to have been admitted to prove the alleged collusion, leaving it to the opposite party to meet his proof in the usual way by counter evidence.—[*No.* 2702, *D. C. Colombo.* (J.)

July 24, (J.)

625.—*Angohamy* v. *Samuel Appoo.*

Where it was stipulated by a mortgage deed that the property mortgaged should be redeemed within a given time; and on its being proved that the property was not so redeemed, *held*, that from that time the possession became adverse. Ten years adverse possession clearly covers any defect of title; so that it becomes immaterial to enquire whether the stipulation as to the repayment was sufficient *per se*, or not, to establish a perfectly valid title.—[*No.* 21,429. *D. C. Colombo, N.* (J.)

Possession o Mortgagee becomes adversef after the lapse of the period fixed for redemption. Ten years possession will give him a title by prescription.

July 31, (O. J.)

626—*Innibo Natchia* v. *Ibrahim Lebbe.*

The evidence in this case has fully confirmed the opinion originally entertained by the Supreme Court, whilst the defendants first witness a Priest, furnishes another satisfactory ground for adjudging damages. He says "That if a man (a Mahomedan) has once made a promise of marriage, he should fulfil it before he contracts another."—[*No.* 2363, *D. C. Matura.* (J.)

A Mahomedan having once made a promise of marriage is bound to fulfil it before he contracts another

627.—*Maloeachigey* v. *Babacha Hamy.*

The principal point in this case, is that the land in dispute being originally Service Parveny,

Transfer of Service Par-

veny Lands previous to 1809, held valid.

and therefore not liable to be mortgaged or transferred; JEREMIE J.—That, it appearing that the deeds bear date in 1804, whilst Governor North's Proclamations of 1800 and 1801 were in force, by which Proclamations "tenure of service was established," (though this tenure was subsequently revived in 1809), the transfers were valid.—[*No.* 14,775, *D. C. Colombo*, *N.* (J.)

September 17, (J.)

628.—*Potsnits* v. *Albertsz* and another.

A party who bonâ fide builds on another's Land, is entitled to compensation.

The Supreme Court concurs fully in the opinion of the District Court as to the right of the respondent to recover her share of the property in dispute. But it appears that the land has been built upon by a purchaser from her co-heir the first appellant, under a title which there were certainly very strong grounds, owing to respondent's own laches, for their believing valid. It conceives therefore that the equity of the principle laid down in *Van Leeuwen* p. 190, and acted upon by this Court in other cases since the Promulgation of the Charter, applies here, and that a full indemnification in money for her share of the said property is all that the respondent can expect or be permitted to recover. On these grounds that part of the decree appealed from by which a specific portion of the land in dispute has been adjudged to the respondent, is set aside, and in lieu thereof it is ordered that a commission of three persons, one to be named by respondent, another by appellants, and the third by the District Court, do proceed to the spot and there enquire and report upon the value of the whole of the piece of ground formerly belonging to the common ancestor of respondent and first appellant, *exclusive* of the value of the house built by *Mr. De Quaker* thereon; and that the present proceedings with the Commissioners' report be then remitted back to this Court.—[*No.* 2893, *D. C. Colombo*. (*J.*)

November 6, (O. J.)

629.—*Gamegey Elias* v. *Bala Ettena* and others.

It is ordered that this case be referred back with

directions that the District Court receive evidence forthwith of the attempt to tamper with the appellants' witness, as stated by the said appellants in their Petition of Appeal; and that it do further forward the evidence and proceedings against the plaintiff for prompting his first witness, as also stated in the Petition of Appeal, together with such further evidence on the merits as either party may think fit to adduce.

Appeal on the ground that the appellant's witnesses were tampered with.

The Supreme Court observes that marginal observations have been made on one of its own decrees in the Registry of the District Court, which would tend to show that the Supreme Court was in error on the points to which these notes refer. This is a proceeding equally irregular and indecorous. The Supreme Court will always willingly receive suggestions submitted in due form from any quarter calculated to correct any of its opinions on points of fact; but a course of this kind it cannot but record its disapprobation of.

Marginal observations by D. J. on the S. C. decree.

Mallepalle, as defined by the best authority on the subject, Bertolacci, "is land that was formerly granted under a tenure, subject to personal services to Government; and which has reverted to Government through failure of male issue to perform those services," and that is the case here. "*Nillepalle* land," he adds, "was granted under the same tenure as the "*Mallepalle*, and which has reverted to Government in consequence of the holders having failed to perform the services to which they were bound by that tenure," which is entirely foreign to the present subject. The duty, if strictly enforced is undoubtedly one-half as stated by Bertolacci; but this amount is in fact often reduced to less, it being the practice to treat them frequently in the same way as *Ratmaherre* when these lands are cultivated by consent of Government.—[*No.* 2317, *D. C. Galle.* (J.)

Mallepalle defined.

November 23.

[The Hon'ble John Godfried Hillebrand Esq. was sworn in as *Acting Second Puisne Justice.*]

November. 27, (O. J. H.)

630.—*Moorger* v. *Wallial.*

A. *D. C.* cannot give Judgment *ultra petita.*

Ther only demand before the Court was for the bond filed by plaintiff. The defendant's bond was only put in evidence without his making any reconventional demand for the amount. The District Court went therefore beyond its powers when it pronounced a claim invalid which was not in suit before it. The decree is in consequence affirmed, in that the bond filed by plaintiff is set aside and his action dismissed; but in all other respects the said decree is annulled, the Court having pronounced *ultra petita.* Each party will bear its costs.—[*No.* 2127, *D. C. Wadimoratchy.* (Coll.)

1840

January 15, 1840 (O.)

631.—*Cader* v. *Ratteralle.*

The Court will reject an ill-written libel

The plaintiff's libel is so ill-written and full of interlineations and blots that it must be taken off the proceedings, and a fair copy put on: the expences to be paid by the plaintiff's Proctor [*No.* 9575, *D. C. Badulla.*]

February 1,

[The Hon'ble Wm. Ogle Carr Esquire was sworn in as *Acting Senior Puisne Justice.*]

April 8, (H.)

632.—*Gomes* v. *Domingo* and others.

In trespass, where a Deft sets up the title of a third party, the Court is not bound to make him a party, unless he chooses to intervene.

It does not appear to the Supreme Court that the title to the land is just now in dispute, inasmuch as the defendants do not claim title to it, or to any portion thereof, either in their own rights or under the first defendant's father. If *Don Bastian Appoo* is entitled to half of the land as is asserted by his son the first defendant, it should be left to him either to intervene or not in this case, as he shall be best advised; but there is no necessity for the Court *ex-officio*, so render him a party to this case, particularly as it is merely a case of trespass to the establishing of

which, the possession at the time of the trespass complained of forms the chief ingredient, but not the title to the land. It is therefore ordered that the Interlocutory order of the District Court of Colombo No. 2. dated 11th of February 1840 be reversed.—[*No.* 6015, *D. C. Colombo.*]

April 15th (H.)

633.—*Selenchy Appoo* v. *Salman* another.

Application for Administration rejected, where it appeared that the deceased had died about 50 years ago, and the property been divided amongst the heirs.

The Applicant having totally failed to put on record his reasons for applying for Letters of Administration to the estate of his deceased father who died according to his own admission, about fifty years since, and there being also reason to suppose from the circumstance of the length of time that had intervened and from the statement of the Opponents that the property which the deceased died possessed of, has been divided amongst his respective heirs and that they and their heirs or others on their behalf have been in the possession of the same ever since that time,—It is ordered that the decretal order of the District Court of Colombo be reversed with costs.—[*No.* 255, *D. C. Colombo.*]

634.—*Hendrick Perera* v. *Dines Appoo.*

The course adopted where the D. C. omitted to record the reasons of its Judgment.

Where the D. C. omitted to record the ground upon which its decision was based the S. C. referred back the case to supply the omission.—[*No.* 25,569 *D. C. Colombo.* S.]

At Chambers (H.)

635.—*Joan* and another v. *Anna* and others.

The course adopted where an Appellant's failure to appeal was owing to the adjournment of the D. C.

Where it appeared that the Appellant's failure to file the Petition of Appeal in due time was in consequence of the adjournment of the D. C. during the Session of the S. C. *held* that the Appeal was to be allowed on the Appellant giving the required security.—[*No.* 1258, *D. C. Amblangodde.*]

April 23, (H.)

636.—*Jayewardene Modliar* v. *Senewiratne Appoo Hamy* and others.

Injunction refused for want of proof of title.

Judgment.—It does not appear to the S. C. that the ground set forth in the application of the plaintiff is sufficient to entitle him to the Injunction applied for, particularly as he has failed to make an averment of his title to the land in dispute and of the matter contained in his application and also to shew by the oath or affidavit of any third person that the matter set forth in his application is true, to the best of his belief—The Interlocutory order of the D. C. of Chilaw and Putlam is therefore *affirmed.*—[*No.* 7765, *D. C. Chilaw and Putlam.*]

637.—*Vapoecando* v *Wagamoettoe* and another.

The poverty of the Plt. furnishes no ground to compel him to find security for costs.

Interlocutory order set aside, and the case referred back to the Court below to be proceeded with, as the poverty or insolvency of the plaintiff furnishes no ground to compel him to find security for costs. Besides all applications of this nature ought to be made at an early stage of the case, which however does not appear to have been observed in this instance.—[*No.* 5497 *D. C. Jaffna,*]

May 6, (H.)

638.—*G. Louis* v. *Yattamalagala G. Andris.*

The Court may order a survey at any time after the List of Witnesses has been filed.

Interlocutory order set aside, it having been made at too early a stage of the case—If the Court should consider after the filing of the list of witnesses, that a survey is absolutely necessary to come to a satisfactory decision of the case, it is perfectly at liberty to make an order to that effect, care being taken to direct the witnesses on both sides to be present at the survey, in order to enable than to speak when they come to give their evidence, with precision and accuracy with respect to the boundary, extent and possession of the land.

An application on the part of the plaintiff praying to summon the vendor of the land to

warrant and defend his title, is appended to this case; but no record is however made of it; if it be an omission it should be rectified, and the application, which appears to be a legitimate one, disposed of.—[*No.* 6933, *D. C. Galle.*]

639.—*Don Adrian* v. *Liane Appowe* and others.

The Court cannot non-suit a Plt, merely because he had not *summoned* certain witnesses.

A witness may be called and examined, though not summoned.

The D. C. non-suited the plaintiff because he had failed to summon certain witnesses, who in the opinion of the Court were absolutely necessary to prove certain payments made by him to the Record Keeper. *Held*, that the decision was premature and it ought to be set aside. *Per* HILLEBRAND J.—The claim of the plaintiff consisted of two items, and the ground of non-suit had reference to one only; and also because the Court ought not to have anticipated that the plaintiff would not have availed himself of the right allowed him by the 28th clause of the *Rules* and *Orders* Sect. 1. and examined the Record Keeper and Secretary, both officers of the Court, although not regularly summoned.—[*No.* 6765, *D. C. Galle.*]

640.—*Happooarachigey Don Gabriel Appoo.* v. *Pedro Silva.*

1. A Plaintiff cannot sue out execution after taking the Defendant's bond for a part of the judgment in satisfaction of the whole.

2. Proof of *actual* delivery of the bond is not necessary, where a constructive delivery has been proved.

3. The Supreme Court

The facts of this case are fully set out in the Judgment, which is as follows:

This is a case of some importance, not only on account of the parties themselves who are Native Merchants, but also on account of the magnitude of the amount, which it involves.

The facts of the case as detailed in the pleadings are shortly these.

The defendant in the course of his mercantile transactions with the plaintiff, which must have been very entensive became in arrear and indebted to the plaintiff, in the sum of £374. 9. 3¾ for which he granted his personal bond dated 20th September 1838 payable in four monthly instalments.

In compliance with the terms of this bond, the defendant paid £150, but as he had made de-

will under certain circumstances stay execution pending appeal.

fault in the payment of the residue, the bond was put in suit and judgment recovered, on the 21st June 1839 for the balance sum, interest and costs.

On the 8th November, the plaintiff sued out execution against the effects of the defendant for the sum of £224-9-3¾ in satisfaction of the judgment, and by force thereof, a house of the defendant situated at Kandy has been seized by the Fiscal of that Province, but the precise date of the seizure, does not however appear, nor is it material; but this Court is inclined to believe that it was sometime before the 20th of December, as the writ was returnable on that day. From this time till the 22nd of April the writ remained in suspense or abeyance, when on the motion of the plaintiff's Counsel, it was re-issued to the Fiscal of the Western Province, who seized a certain sum of money in the hands of Messrs. Wilson Archer and Co., but the amount however is not stated by the return to the writ.

On the 24th of April the defendant filed an application, setting forth that, in consideration of the sum of £75 paid by him to the plaintiff in satisfaction of the judgment, he had remitted to him £24-0-5½ and consented to accept his bond for the balance sum of £160-10-0 payable in one year with interest, and that a bond for that amount containing those conditions, prepared by Mr. Drieberg the Notary, at the plaintiff's express desire, was executed by him in his name, but whether the plaintiff was to perform any and what condition on his part, beyond the remission aforesaid is not stated; but it is to be implied from the nature of the agreement between the parties that he was to enter satisfaction of the judgment, or to grant a release, otherwise he would have two securities or payments, for one debt. The defendant then goes on to state that notwithstanding the premises, the plaintiff subsequently to wit on the 22nd of April took out execution against his effects, and that it was then in progress against his property and that part of it had already been

seized by the Fiscal of Colombo; and therefore prayed that the writ might be recalled and cancelled.

This application being filed, supported as it was by the affirmation of the defendant and the affidavit of a third person, as far as regards the execution of the bond, the District Court ordered on the 24th of April, the execution to be stayed till further order, and a Rule Nisi to issue to the plaintiff.

On the day the rule was returnable, which was on the 28th of April, the plaintiff or rather his Counsel appeared before the Court; but instead of shewing cause or taking time to do so, commenced examining the defendant; at the conclusion of which, the District Court, on his motion discharged the order for the stay of execution, and sentenced the defendant moreover, to one month's imprisonment, on the ground that he had, as is stated, attempted by his averment and affirmation to deceive and mislead the Court.

Against this order and sentence, the defendant interposed an appeal and the case was called on for hearing on the 29th of April, but it was ordered to stand over for this day, the Counsel for the plaintiff stating to the Court that he had no notice of the appeal and was consequently unprepared to argue the case.

Whilst the Court indulged the plaintiff in the postponement of the case, it took care to prevent the commission of an irreparable injury in the interim, by ordering on the motion of the defendant's Counsel, the execution to be stayed till further order; and the Court also ordered the defendant to be discharged, as it appeared to it, upon the first blush of the case, that the District Judge in his anxiety to do justice between party and party, had fallen into an error, by not being much familiar with the dealings of Native Merchants.

It is contended by the defendant's Counsel that the plaintiff has no right to enforce the writ against him, inasmuch as he has paid him through Mr. Ritchie's Conicoply the sum of £75 and

executed a Bond in his name for the balance sum of £160-10-0 in terms of the agreement. Of the fact of the execution of the bond there cannot be the slightest doubt, as the plaintiff himself through his Counsel admitted it before the District Court. What right then the plaintiff had after that to refuse, as he says he did, to receive it, and to enforce the writ against the defendant's property, this Court cannot conceive. The defendant to a question pointedly put to him certainly stated that the bond was not delivered by him to the plaintiff, this question was proposed with with a view no doubt, to shew that the bond although executed, had not been delivered to the plaintiff, which is certainly necessary according to the English Law, whatever it may be by the Roman-Dutch Law; but that Law even does not require a formal delivery; circumstances equivalent to it are sufficient; as a deed may be delivered either by actual delivery or by words, or acts equivalent to a delivery. The question therefore is, whether the facts appearing in this case amount to a delivery? The plaintiff admitted before the District Court that he refused to receive the bond, which shews clearly that it must have been delivered to him by words or acts equivalent to a delivery, otherwise he could not have declined to receive it. The statement of the defendant when he says that he did not deliver the bond to the plaintiff, must therefore be taken or construed to apply to the *actual*, but not to the *constructive* or *circumstantial* delivery. Upon this and other circumstances this Court is satisfied that there was a delivery of the bond. This brings the Court to the question, whether the plaintiff supposing the £75 had not been paid him, as he alleges he was not, had a right to enforce the writ against the defendant after he had, as already said, executed and delivered his bond to him and thus performed part of his agreement? This Court is disposed to think not, as the parties cannot be placed in the exact situation in which they respectively stood, when the agreement was entered into, and also because there is no right vested in the plaintiff by the agreement

(as far as the Court can collect from the facts in the case) to rescind it, by him alone, without the concurrence of the defendants. Besides if the plaintiff were allowed to proceed with the writ, it would be a fraud on Mr. Ritchie's Conicoply, who with a view of preventing defendant's property from being sold and his person immured within four walls at least for the space of one year, undertook and promised the plaintiff, to pay him £75, but whether he did so or not in point of fact, is a point for evidence; bnt there are however circumstances in the case as will be noticed presently, which impress the Court with a belief that if the payment had not been made, the plaintiff had at least accorded time for it, or suspended his right for a while.

In the course of the argument it has been said by the plaintiff's Counsel that the payment of £75 was a condition precedent, thereby intending to convey to the Court that it ought to have preceded the remission promised by him and the execution of the bond by the defendant, and even if it were so that would not in the least alter the case, because it is not denied by the plaintiff that Mr. Ritchie's Conicoply promised and undertook to pay him the sum of £75 and that he has consented and agreed to receive it from him, and what is more, he himself directed the Notary to prepare the bond for the defendant's signature, which leads the Court to suppose that the plaintiff, has either been paid by Mr. Ritchie's Conicoply or that he has given him time to do so, or that he has at least waived his right to receive the payment before the execution of the bond and the remission of £24-3-3$\frac{3}{4}$.

But although in point of fact the payment had not been made by Mr. Rrtchie's Conicoply, still that would not entitle the plaintiff to consider the agreement at an end and to treat it as wholly determined, as the defendant had performed part of it and the parties cannot consequently, as already said, be put *in statu quo*, his remedy therefore was (after due notice of such default of the defendant, which however does not appear to have been the

case) an action for compensation in damage for such default, or to enforce the writ for the £75, after suggesting on the record of the Court, all the circumstances of the case if there were nothing to the contrary in the agreement, either expressed or implied, which this Court at present is unable to judge, from the whole facts of the case not being before it, which is mainly to be attributed to the line of procedure or defence adopted by the plaintiff.

It is admitted by the Counsel for the plaintiff that the District Court was perfectly justified upon the facts laid before it, to order as it did, the stay of execution till further order, if so, what is there in the answers given by the defendant while under examination, to justify it to rescind it, the plaintiff's Counsel says the District Court disbelieved the defendants statement *in toto*; but how could that be when the plaintiff himself through his Counsel admitted before it a part of that very statement, namely, the direction given by him to the Notary to prepare the bond and the execution of it by the defendant. If the District Court disbelieved any part of the defendant's statement it must have been that part only, where he speaks of the payment of £75 to plaintiff, because in his examination he stated that Mr. Ritchie's Conicoply undertook to pay it for him, but that he was unaware whether he did so or not; but this Court cannot see any very material difference in these two statements, because the defendant might have had reason to believe, as will be stated presently that Mr. Ritchie's Conicoply had paid the £75 according to his promise and undertaking, although in point of fact he was not aware of it at the time of his examination. If the District Court had any doubt upon the subject, as it appears it had, the course to be pursued for it was, to allow the case to go to evidence; but not to dissolve its order for the stay of execution, and sentence the defendant to one month's imprisonment as it did. This leads the Court to the question, whether there is any thing in the application filed by the defendant

contrasted with his answers to call forth the punishment awarded against him by the District Court? This Court is inclined to think not, because according to the dealings between the Native Merchants here, to which class the parties belong, an undertaking and promise of a third person, as in this case, to pay the debt of the defendant to the plaintiff, and his undertaking to receive it from him (which it appears the plaintiff did from the question proposed by him to the defendant) are considered equivalent to actual payment (but whether such an undertaking can be enforced in Law, is a question which much depend upon the merits of each case, and upon which this Court will express no opinion as it is now not called upon to do so) and consequently when he instructed his Counsel to draw his application he without entering into any detail, merely stated to him that he paid to the plaintiff £75 not however with an intention to mislead and deceive the District Court, as it was led erroneously to believe, but from a conscientious belief that such undertaking to pay and consent to receive was equivalent to an actual payment.

As the fact placed on the record are imperfect, it is quite clear, and it is also admitted by the plaintiff's Counsel that the case must be remitted to the District Court for hearing; but it is contended by him that there is no evidence before the Court to authorize it to continue the order for the stay of execution; but this Court is satisfied that the facts appearing in the case, are quite sufficient to justify it to continue the order till hearing; a contrary direction would be attended with very great mischief, the defendant's property will be sold, his credit ruined, he himself perhaps incarcerated, while the District Court is enquiring whether the plaintift is entitled to his execution or not, and if it should turn out that he had not, and he in the mean time happens to die, or turn a bankrupt, the defendant will, be witb ut any remedy whatever; on the other hand, the suspense of the execution for a time,

will not be attended with equal prejudice, particulary as the property of the defendant has already been seized under the writ.

It is therefore ordered that the decree and sentence of the District Court of Colombo of the 28th of April last be reversed and the case remanded to the Court below for hearing with direction to stay the execution still such hearing. The costs to abide the ultimate decision of the case.—[*No.* 24,601, *D. C. Colombo*, S.]

May 13, (H).

641.—*Janis Fernando* v. *Joseph Piris.*

Rule as to Costs in Slander cases; and as to Fine for Prevarication.

If the plaintiff had proved his case, as in the opinion of the District Court it appears he has, in which opinion however this Court cannot agree, the District Court would have been perfectly justified in awarding the amount of damages claimed by him, or such portion thereof, as in its opinion he was entitled to have for the injury sustained by him at the defendant's hands; and even if he had failed for want of sufficient proof the Court would have been fully warranted to award him his costs, if it were satisfied that the improper conduct of the defendant gave rise to the action, and the justice of the case demanded it; but the 29th Clause of the *Rules and Orders* Section. I. does not authorize the condemning a defendant to pay plaintiff's costs, or any sum of money to the Crown, merely because the plaintiff has evinced no vindictive or improper feelings. The recited Clause only subjects a party to pay costs or fine, which the Court may think proper to award, if he by his answers attempted to mislead and deceive it; but no such thing is imputed to the defendant here, and even if it were, the Supreme Court would not have felt itself justified to affirm it, as it cannot ascertain to what part the observation has reference, and as the defendant has been examined upon facts which form no part of the slanderous words laid to his charge in the libel, and upon which no verdict could have been found against him.

Decree of the District Court reversed in so far as it condemns the defendant to pay plaintiff a sum equal to his costs, and the sum to the Crown.—[*No.* 25,868, *D. C. Colombo*, S.]

May 20, (H).

642.—*Meera Lebbe* v. *Seesma Lebbe.*

Best Evidence.

The decree in this case is not founded upon the best evidence which the nature of the case admits of. It stands, moreover, upon the testimony of one single witness, unsupported by any other evidence, although it was capable of corroboration. The alleged purchase and receipt of articles by the defendant, took place,—if the witness is to be believed,—at the plaintiff's shop, and yet his shopman who is the best or primary evidence has not been called, nor his Journal or Waste-Book produced in support of it, or their absence accounted for. The decree of the District Court is therefore reversed.—[*No.* 28,190, *D. C. Colombo*, N.]

May 30, (O. C. H.)

643.—*Weregalle Mohotta* v. *Weregalle Peruma.*

The Father is not of kin to his *Beena* children. Qu?

This case was referred back to the D. C. to take evidence on the following point laid down in *Sawer's* Treatise :—" The father is not the heir of the property of his children born in a Beena marriage, which they have acquired through their mother. The maternal uncles or next of kin on the mother's side are the heirs to such children."—[*No.* 5807, *D. C. Seven Korles.*—(Coll.)

June 24, (H).

644.—*Cader Lebbe Issuboo* v. *Andoo Lebbe Markar.*

On a postponement in consequence of a Proctor's absence, the S. C. directed the Proctor to pay the batta of the witnesses.

Where the trial of a case was postponed owing to the absence of plaintiff's Proctor, and not in consequence of any fault on the part of the plaintiff, *Held* that the batta to defendant's witnesses, if any, should be paid by the Proctor and not by the plaintiff.—[*No.* 6823, *D. C. Galle.*]

645.—*Don Philip* v. *C. Swarne* and others.

The District Judge cannot, without the consent of the Parties, appoint an Arbitrator or Umpire.

Although the parties to a suit have a right, with the concurrence of the Court, to refer their differences to Arbitration; yet the District Court has no right to delegate its authority to others (as it did in this case) by appointing two Arbitrators for and on behalf of the Court, and by reserving, moreover, the right of nominating an Umpire in case the Arbitrators named by the Court and the parties, should be equally divided in opinion: particularly as the parties have not signified their assent to it by subscribing the Record, containing such order of reference. The decree of the District Court is set aside, and the case remitted back to the District Court for hearing, with liberty to the parties to enter into an agreement or acts of submission to refer the matter in dispute for the decision of such Arbitration *as they may choose to name*; and in which case the agreement or submission should be made a Record of the Court and signed by the respective parties.

It should be advisable for the parties, either to name an Umpire at the time of submission to decide the question in dispute, in case the Arbitrators should differ in their opinion; or to vest the Arbitrators (also at the time of the submission) with the power of choosing an Umpire, before they enter into the investigation of the matter in litigation.—[*No.* 5464, *D. C. Matura.*]

July 8, (H).

646.—*Benj: Hopker* v. *Susanna W. Pfeiffer.*

Deficiency of Stamp how supplied.

The Ordinance No. 6 of 1836, and the repealed Regulation No. 4 of 1827 do not render deeds or other instruments void, which are not properly stamped, but merely prohibit such deeds or instruments from being given or received in evidence; and the 9th Clause of the said Ordinance allows (as did the 18th Clause of the repealed Regulation) every deed or instrument insufficiently stamped to have the same duly stamped at any time, on complying with the requisitions therein stated. And as the application to have the dis-

puted instrument properly stamped was made by the plaintiff before it was read or given in evidence, supported as it was by an affidavit that no fraud was intended; and he has likewise paid into the Court the penalty fixed by the 9th Clause of the said Ordinance, this Court can see no reason why the application should not be granted.

It has been contended by the deft: that the Regulation No. 4 of 1827 ought to govern this case, but the Court is inclined to think otherwise, as that Regulation has been repealed by the subsequent Ordinance No. 6 of 1836 with the exception therein excepted; which exception however does not at all affect plaintiff's case, save and except as to the amount of stamp the instrument ought to have been written upon, and the annexation of stamp to make up such amount.

It has been urged on the part of the plaintiff (but which he had no right to do from the line of procedure adopted by him before the Court below) that the instrument bears a sufficient stamp, inasmuch as there is another stamp on the other half sheet of the same paper, on which the instrument is written and hence not annexed; but this Court is of opinion that according to the 19th Clause of the said Regulation the instrument itself must bear the proper stamp, which however is not the case here.

Where an instrument is written on half the sheet only, it is not sufficient that the other half sheet contains a stamp equal to the deficiency.

The decision of the Court therefore is that the instrument in question is insufficiently stamped.—[*No.* 28,096 *D. C. Colombo*, S.]

July 15, (O. H.)

647.—*W. Ahamado* v. *C. M. Candoo*.

The Appellant having failed to take out the subpœnas on the day fixed by the District Court, the latter imposed upon him the condition of paying the costs already incurred before he could be allowed to take them out, *Held* that the Court was not justified in doing so, and *Per* HILLEBRAND J.—" The object of the order of the 25th April to " cite the witnesses before the 10th June was, no " doubt, with a view to ensure their attendance

Where a party fails to issue subpœnas on a day appointed, the Court cannot impose conditions on his issuing them afterwards.

"on the day of trial, by timely service of sub- "pœnas on them, but the object could by no "means have been defeated by the subpœnas be- "ing taken out to them on the 15th or 16th as the "trial was fixed for the 25th, and the witnesses are "living, as the Appellant says, (and which is not "contradicted,) within one or one and a half mile "from the Court.

"If the witnesses failed to appear on the day "of trial, owing to the Appellant's neglect to take "out subpœnas to them in due time, then, and "in that case, the Court would have been justi- "fied to order him to pay the costs of the day, "or to make such other order as the nature and "justice of the case required; but it was not "warranted to order him, as it did, to pay all the "costs, merely for an unimportant and perhaps "an unintentional neglect on his part."—[*No.* 5963, *D. C. Jaffna.* (H.)

July 18, (O.)

648.—*Wapumpurea* v. *M. Mudianse.*

The S. C. will correct a manifest error in a decree already pronounced.

Where it appeared that the judgment of S. C. for the plaintiff was erroneously entered for one ammonam of *rice*, instead of one ammonam of *paddy*, the S. C. ordered the Registrar to amend the said decree by altering the word "rice" into "paddy."—[*No.* 1434, *D. C. Colombo.*]

August 5, (H.)

649.—*Don Abram de Silva* v. *L. Christian* and others.

Where a party failed to give security in appeal through ignorance, the S. C. allowed him to do so after the limited time.

Where the S. C. was inclined to believe that the Appellant was not aware that he had to give securities for appeal, it ordered that the appeal be allowed, provided the Appellant do give the requisite security within fourteen days after the communication of its order to him.—[*No.* 1034, *D. C. Amblangodde.*]

August 19, (H).

650.—*Justina Seytan* Admx. of *A. Seytan* v. *L. Fernando* and another.

According to the Roman-Dutch Law in force

in the Maritime Provinces of this Island, the community of goods between man and wife takes place on the completion of the marriage, unless excluded by an Ante-Nuptial Contract;—which however does not appear to have been the case here.—A just half of the common property which belonged to the plaintiff's intestate and his wife ought therefore to devolve on his children; but as he had left none, it ought to go to his other heirs at law, or to his legal representative. The half belonging to his wife, who died after her husband must devolve on her daughter, though illegitimate.—[*No.* 5097, *D. C. Colombo.*]

Dutch Law rule of Community.
The wife's half-share devolves on her children, though illegitimate.

September 19, (C).

651.—*Piris* v. *Perera* and another.

Under the 32nd Rule of Section I, any third party may intervene at any stage of a suit before execution, but it is a *voluntary* and not a compulsory proceeding in the first instance, though after a person has once intervened, he becomes amenable to process in default like other parties.

The proper course where any vendor is required to be a party to the suit is *not* to order him to intervene, but to order the plaintiff to amend his libel by making such vendor a co-defendant, and then compulsory process, in default of appearance or answer, can be correctly enforced against him.

As the Court also ought never to make any decree without all proper parties being before it, the defendant can always avail himself of the objection for want of parties, so as to force the plaintiff to bring such parties before the Court.—[*No.* 19,557, *D. C. Colombo* S. (C).]

A party cannot be compelled to intervene; but where a vendor refuses to intervene the plaintiff may amend his libel by making him a party defendant.

652.—*Juan Naide* v. *Siman Silva.*

The plaintiff's Notarial Bond though of prior date, is not entitled to be satisfied out of the proceeds of the land in dispute, in preference to a subsequent special mortgage of such land; and if the defendant proves that he has redeemed the whole mortgage out of his own money, he is en-

A special Mortgagee is entitled to preference over a prior creditor, though holding a Notarial Bond.

A party paying a prior mortgagée is entitled to stand in his place without Cession of Action.

titled to stand in the place of the original mortgagee as to the portion he has *bonâ fide* paid on behalf of the plaintiff's debtor, without any Cession of Action, which has been held by the Supreme Court to be unnecessary in this Colony.—[*No.* 6679, *D. C. Colombo* (C).

October 3, (O. C. H).

653.—*Meden Saiboe* v. *Sibra Saiboe* and others.

Frauds and Perjuries.
Reg. No. 1 of 1806 does not act retrospectively.

The Regulation No. 1 of 1806 does not operate retrospectively and therefore cannot be pleaded in bar to the present action, and if it could operate so as to effect the validity of the plaintiff's deed, yet the plaintiff having set up a prescriptive title should have been allowed to prove such prescription.—[*No.* 6218, *D. C. Chilaw and Putlam* (Coll).

654.—*Sinne Meera Lebbe* v. *Catche Umma.*

Mahomedan Law.
A Husband and Wife may sue each other.
A Wife deserting, may be sued for any property taken away by her; and forfeits her dowry, or, if already paid, double; and the Husband may sue without first applying to the Priest or Arbitrators.

In this case the Court, sitting Collectively, ordered that evidence should be admitted as to certain points of Moorish Law and Custom *viz*;

1st. Whether a husband and wife can reciprocally sue each other?

2nd. What penalty a wife pays, who deserts her husband and lives with another man?

Whereupon certain witnesses were duly sworn and examined, who deposed to the following:—

1st. A husband or wife can reciprocally bring actions against each other without having been previously divorced.

2nd. If a wife run away from her husband and live with another man, he can bring an action against her to recover any property of his she may have taken away with her. The husband might claim an ear-ring out of her ear if it were his, but not the shift off her back.

3rd. The wife who so runs away forfeit a sum equal to the amount of the dower; that is to say, Rix dollars forty in this case, being the amount stipulated to be paid by the husband. If it has been paid she ought to forfeit Rix dollars eighty.

4th. The husband may bring his action for this penalty, or for his goods taken away, without first going to the Priest or Arbitrators.—[*No.* 8163, *D. C. Chilaw and Putlam* (Coll).

October 13, (O. C. H).

655.—*Sitter* v. *Wally* and others.

Jaffna Customs.
A woman attains majority at 13, and may then marry without the Parent's consent.
If forcibly abducted, the father may sue.

The Court sitting Collectively ordered that evidence should be admitted as to certain points of Law and Custom arising in this case *viz*:

1st. As to when a woman becomes a major, and whether she can then marry without her father and mother's consent?

The following witnesses were duly sworn and examined.

Nagendre Ayer.
Sube Ayer.
Ayer Coorookel,

who stated as follow;

1st. A young woman becomes major at thirteen.

2nd. She may then marry without her father's or mother's consent.

3rd. If a man takes her away by force, the father can bring an action; but not if by her consent.—[*No.* 2419, *D. C. Wadimorachy* (Coll).

November 7, (C).

656.—*Jeronis Fernando* and another v. *Anthony Peries*.

An offer of Compromise, unless accompanied with a caution that it is confidential, is admissible in evidence.

This case is referred back to the Court below to examine the plaintiffs as to the alleged offer by defendant since the institution of this suit, to give a bond to plaintiffs payable in eight months for the amount claimed; and to take the evidence of the plaintiffs in proof thereof, and also the defendant's evidence to rebut the same. An offer of a specific sum by way of compromise after an action is brought is admissable in evidence, unless accompained with a caution that the offer is confi-

dential, (*Wallace* v. *Small*, M. & M. 446). In the present case the offer is not of a less sum "to buy peace," and it is not said to be without prejudice, and an offer to compromise may be very well made without restriction as to confidence. The offer however appearing to have been made prior to the filing of the lists of witnesses, the plaintiffs must be restricted to the witnesses named in their list, but as the defendant cannot be presumed to be equally prepared on the point, he may call additional evidence thereon.—[*No.* 6511, *D. C. Colombo.*]

December 16, (O. C. H.)

657.—*Aberan* and others v. *Paulus De Silva* and another.

Form and mode of effecting Partition.

The Order of the 4th September Ultimo, that the division by the Maha Vidhan of the 9th July 1840 be made a Rule of Court, and that all parties, abide thereby, be *reversed*; and the proceedings be referred back to the D. C. to issue a Commission to three persons to be chosen by the parties, or if they cannot agree as to the three persons, then each party will select one Commissioner, and a third will be nominated by the Court; and the three Commissioners so appointed will then proceed to fairly divide the land according to the respective rights of the parties, and mark out the bounds of such division, and report the same together with any amount which they may consider either party, should pay to the other for *equality* of partition; and if they do not concur, then the Commissioners may send in separate reports, and the D. C. will after hearing the exceptions of parties to the same, decree such final division as it may then see fit.

The D. C. appears to have misapprehended the Collective decree of the S. C. which never contemplated the appointment of one Commissioner with such arbitrary powers, as that all objections of the parties (provided he acted with just intentions) were to be wholly disregarded both by himself and the D. C. but the order was for him to make a

fair division, of which the Court of course must be the ultimate Judge on confirming the report. It must be here noticed also (as the omission tends to mislead) that in the case *No.* 686 *Galle*, referred to in the above Collective decree as a *precedent*, each party was previously declared therein by the Court to be entitled, "to one half of the garden on *each side*, that is on the Talpe side, as well as the Dodampe side," and therefore all that was left by that decree to be performed, was the mere ministerial duty or manual labour of a Surveyor in measuring the exact moieties, and marking the boundaries accordingly. The S. C. does not moreover clearly understand why the D. C. has treated the report of 1838 as a nullity, or entirely abandoned, and issued an order for a separate distinct report without having even heard and recorded any exceptions to the first report.

It is clear that the real ground of dispute between the parties is that the Northern part 'is the best or most productive portion of the land as alleged in the defendant's answer, and that each party wishes to secure it. The plaintiff's in their survey appropriated it accordingly to themselves, while on the other hand, in the report of 1838 they are entirely excluded from it, by their $\frac{5}{12}$th being wholly apportioned on the Southern side. The last report endeavours to meet the above objection, (it is presumed, for no specific reasons are alleged therein) by giving to the plaintiffs a portion out of both the Northern and Southern sides. The S. C. has no doubt of the just intentions of the Maha Vidhan in making such a division, but it is an unusual mode in Law of making a partition, and the allotment of two distinct portions to the plaintiffs situated in different extremities of the land must in all probability be very prejudicial to the respective value of the property allotted to the plaintiffs, and to the defendants, and accordingly it is not a *fair* division, not being for the mutual interest of both parties. If one part of the land is more valuable, or productive than another, the proper course is that the party taking such lot should either have a less portion, or pay a sum to

the other for equality of partition, but care should be taken not to diminish the value of both estates by further subdivision of the property. In the same manner the trees should be divided according to the respective estates and interests of the parties, or if from their situation or otherwise that is not practicable, a sum of money, or other allotment should be awarded in lieu thereof for equality of partition.—[*No.* 2235, *D. C. Amblangodde.* (Coll).

December 23, (O. C. H.)

658.—*Don Siman* and others v. *Mathes* and others.

The Government of Ceylon. Intervenients.

The "Government of Ceylon" is not a sufficient description of an Intervenient.

"The Government of Ceylon" is not a sufficient description of an Intervenient in a suit, and the exception thereto must be sustained.—[*No.* 3041, *D. C. Galle* (Coll).

1841

January 27, 1841. (C.)

659.—*Gomes* v. *Fernando* and others.

Statute of Frauds. A contract for the sale of *growing* timber must be in writing.

A contract for the sale of *growing* timber must be in writing, executed before a Notary and witnesses, according to the provisions of the 2nd. Clause of the Ordinance No. 7. of 1840, because *growing* trees are *immoveable* property; but when broken off, rooted up, or cut down, (i. e. severed from the soil) they become thereafter *moveable* property. Thus Voet says (Lib. 1. Tit. 8. § 13.) "*Arbores quoque fundo hœrentes, immobilibus* "*accensentur, ut partes prœdiorum: quœ omnia,* "*ubi ruta seu eruta et cœsa fuerint, uti desinunt* "*fundi partes esse, ita in posterum mobilibus an-* "*numeranda sunt; nec amplius fundi domusve* "*jura sequuntur.*"—[*No.* 30,502 *D. C. Colombo,* S.]

February 6, (C.)

660.—*Omer Lebbe* v. *Pakier Tamby*.

Force of a Judgment in appeal.

Though the S. C. would never allow the inferior Court to call in question the propriety of

its decisions on the points decided before it, but would expect the most implicit compliance to all its orders therein; yet whenever on further evidence being directed new matter transpires, which is conclusive of the suit between the parties, the D. C. exercises only a very proper discretion in not proceeding further in the inquiry, and in doing so, it fully acts up to, and complies with the whole intention and spirit of the order of the S. C.—[*No.* 5391, *D. C. Batticaloa.*]

Procedure on a remand for further evidence.

February 8, (O.)

661.—*Casy Lebbe* v. *Canjy Lebbe.*

Every man has a right to abate an obstruction on a public path.—[*No.* 6989, *D. C. Colombo.*]

Right of abating obstructions.

February 20 (C.)

662.—*The Queen's Advocate* v. *Mendis.*

This case was remanded to the Court below to take further evidence on both sides as to the loss on the re-sale of a garden. *Per* CARR J.—Mr. Advocate Hanna, as Counsel for the Appellant has strongly urged upon the attention of this Court, that the amount received on the resale was matter only of *admission* on the plaintiff's part in reduction of the plaintiff's full demand for the whole purchase money, and that the plaintiff was not therefore bound to prove the loss on a resale. But the cases of *James* v. *Shore* 1 Stark. 430, and *Hageden* v. *Laing* 6 Taunt. 166, might be cited to show, that where the vendor has power to resell, an action to recover the whole value of the land or the goods bargained and sold, could not be maintained after resale; and in the present case the pleadings also are not only not framed to support such view. But the Conditions of Sale do not appear to leave it at the *option* even of the plaintiff to resell. The terms are not on failure of payment by the purchaser, that the garden *may be resold*, or that the plaintiff should be at *liberty to resell*; but the words are, "the garden *will* be resold at the risk of the purchaser, "in *which case* the purchaser shall be held liable

An action does not lie for the whole of the purchase-money, where the vendor has exercised his right of reselling.

The District Court may hear witnesses, though not on the List; and may call witnesses at its own instance.

"for any loss that may occur from such sale." If any doubt existed as to how the parties understood the Conditions of Sale on this point, the plaintiff has by his own acts, both in the resale, and his pleadings put such a construction upon it. The whole gist of the plaintiff's action is the *alleged loss* upon the *resale*, and it is clearly for plaintiff to prove the extent of defendants present liability by proof of the loss which actually occurred on the resale according to the Conditions. Though the concluding paragraph of the 20th Rule of Section 1, has been relied on by the Proctor for the defendant as warranting the exclusion of the documentary evidence adduced, yet the 28th Rule of Section 1, clearly provides for the hearing of *witnesses* (though not on the list) tendered during the time of trial to prove a necessary point, and the *provision* also in the 28th Rule commencing with the words "and if the Court shall consider *further evidence* necessary (in addition to that adduced by the parties) for the purposes of justice &c." ; has always hitherto received a liberal and enlarged construction, as vesting the District Court with a discretionary power to examine or call for any *further written* or *parol* evidence, which it may think necessary ; though to prevent the unnecessary attendance again of the witnesses summoned, or the loss of their evidence by death, it is expressly directed in any such case of delay to examine the witnesses present. At all events the Supreme Court clearly has the power under the 35th Clause of the Charter to receive or admit any such further evidence, and it has no scruple for the purposes of justice, and to prevent further litigation, in remanding this case accordingly for the admission of such evidence, and also for further hearing, as the case for the defendants appears to have been stopped upon the failure of the plaintiff's proof.—[*No.* 191, *D. C. Colombo,* N.]

March 3, (O. C.)

663.—*Wally* v. *Wary.*

Alivan Moorgen. Intervenient.

The death of

Per Carr J. *delivering the Judgment of the*

Court.—" The death of *all* the attesting witnesses will not dispense with the legal proof of the deed."—[*No.* 2654, *D. C. Wadimoratchy.*]

all the attesting witnesses does not dispense with the legal proof.

March 6, (O.)

664.—*Maleweraya* v. *Periatamby.*

Moorgeser Ayer and another. Appraisers.

The Appraisers fee is a charge upon the estate of the deceased, payable by the Adminstrator. *Per* Oliphant C. J. [*No.* 7998, *D. C. Jaffna.*]

The Appraiser's fee is a charge on the estate.

March 24, (H).

665—*In rê Rassie Oema.*

Hadjee Abdul v. *Serjeant Ismail* and another.

It is only in extreme cases that the Supreme Court would be inclined to sanction the granting of Letters of Administration to the Secretary of any Court, in preference to the next of kin, who by Law is entitled to the same.—[*No.* 22, *D. C. Galle.*]

It is only in extreme cases, the Court would prefer the Secretary to the next of kin.

April 7,

[The Hon'ble Wm. Ogle Carr Esquire was sworn in as *Second Puisne Justice.*]

[The Hon'ble James Stark Esquire was sworn in as *Second Puisne Justice.*]

June 16, (O.)

666.—*The Government of Ceylon* v. *Kurnwitte* and others.

Leave given to the defendants to proceed in the prosecution of the appeal noted by them, without giving security for the amount of the judgment, or for the costs in appeal; provided it be made to appear to the satisfaction of the D. C. that the property of the defendants, or any of them, which has been sequestered at the suit of plaintiff in this action, is sufficient to satisfy the amount of the said judgment, and such costs as the plaintiff may probably be put to in prosecuting the said appeal.—[*No.* 13,536 *D. C. Kandy,* S. Also *No.* 13,998 *D. C. Kandy* S.]

Security in appeal dispensed with where the property sequestered is sufficient to cover the judgment and costs.

June 23, (O.)

667.— *Siman de Alwis* and others v. *Daniel Perera* and others.

The Court will not delay proceedings on an irregular Intervention; but their will be claims reserved.

Decree of the D. C. affirmed with costs but without prejudice to the respective claims of the Intervenients, if they should be advised to bring any fresh action for the same. In their present petitions however the Intervenients have not even set forth in what manner they deduce their title (as through what heirs &c. they claim) and the first step therefore upon any further inquiry being directed, as prayed for, respecting their claims, would be to require an amendment of their own pleadings. It is not just that the defendants should suffer from the neglect of these Intervenients; and upon such informal and defective pleadings this Court will not on appeal remand the case for further inquiry into claims so irregularly brought forward, when it would thereby suspend the decree in favor of the defendants against the plaintiffs, and delay for an indefinite period the defendants recovering the heavy costs, which they have incurred in this suit.—[*No.* 28,228 *D. C. Colombo*, S.]

668.—*Mahlem Sultan* v. *Minna Markan.*

Rules as to production of deeds before, and at the Trial.

The Rule, Section 1. provides specially for the non-production of the originals of such written documents as are in the hands of third parties, and cannot therefore be produced till the trial. And if the plaintiff could not at the trial satisfy the Court that he was unable to file either the original or copy, the D. C. might refuse to receive the deed in evidence, but otherwise, if he satisfactorily established the loss of such deed in the hands of a third party, secondary evidence might be admitted of it.—[*No.* 7571 *D. C. Colombo.*]

669.—*Seydoo Meera Lebbe* v. *Bastian Fernando* and others.

A woman under coverture cannot sue, without join-

The plaintiff cannot support this action upon his contract only with *Francina Fernando*, she being the wife of *Gallegey Bastian Peris*; and on the other hand until the husband *Bastian Peris*

gave his consent to the defendant's detention of the cattle in question, the defendants were wrong-doers in their entry on the plaintiff's premises, and in forcibly taking therefrom the said cattle.—[*No.* 6499, *D. C. Colombo.*]

ing the Husband.

June 30, (C).

670.—*Ootoopulle* v. *Wood.*

The Court will not discharge a surety for costs, where the security was ordered by consent.

Costs disallowed, for improper language in the Petition of Appeal.

It appears from the proceedings that the security was ordered on the 25th February 1839 upon the consent of both parties; and the merits of the present application also have been fully decided upon, on a similar application by the surety on the 16th October 1840, when the D. C. refused to cancel the security bond, and no appeal was entered from such order. It is sufficient on this appeal therefore, to observe that the Supreme Court will not in the present stage of the suit discharge a security for costs so entered into, especially as it appears from the motion (January 5th 1838) that the mere poverty of the plaintiff alone was not the sole ground for the defendant's requesting this security; and Sir Charles Marshall in his printed collection of the *Decisions of the Supreme Court* page 78, has justly remarked that, though the Supreme Court has decided that the mere poverty of the plaintiff furnished no reason for demanding security for costs, "cases may however present themselves in which other grounds, as suspected fraud, or the like, might justify this precaution." Besides the present application of the plaintiff being upon its merits, is a repetition of what the District Court had already previously decided upon. Both the *written motion* and *Petition of Appeal* contain grossly impertinent language, which shew that the Proctor (Mr. Collette) by whom they are drawn up, is very unfit for his duty, either from being very imperfectly conversant with the English language, or ignorant of the ordinary respect due in his profession to the Court, and of the proper manner in which applications, or pleadings should be drawn out. He is accordingly disallowed all his costs of this application and appeal, and the District Judge will

moreover publicly reprimand him for the above expressions; and upon any repetition of the like misconduct, the Supreme Court will not fail to notice it more severely.—[*No.* 5659, *D. C. Jaffna.*]

July 3, (S.)

671.—*Layard* v. *Wellon Arachy.*

Evidence of Right of Way.

The S. C. consider that the evidence in proof of the path having been so long used, and the existence also of a stile at the place in question, when the garden was fenced round in the Dutch time (as deposed to by the fifth witness) sufficiently establishes defendant's claim to it as a *foot way*; but that it is not a way for horses, or cattle, and the plaintiff may accordingly replace the stile.—[*No.* 6873, *D. C. Colombo.*]

July 10, (C.)

672.—*Fernando* and others v. *Anto Naide* and others.

In trespass to goods, direct proof of the taking is not essential.
Justification.
Costs in the original class.

JUDGMENT:---That the decree of the D. C. of Colombo S. be reversed; and the defendants are decreed to pay to the plaintiffs the sum of £3 the value of three Nets, with costs of suit in the third class. The Supreme Court cannot concur with the District Judge in the reasons which he has recorded for his dissenting from the Assessors, as it consider the weight of evidence shews that plaintiffs' two first witnesses who depose to six Nets having been laid by the plaintiff's and brought ashore by the defendants, were close to the spot; and as to the breadth of the river at the place, which the District Judge has referred to as a general ground for discrediting all the witnesses on the point, it is not proved in evidence, whilst it is stated at the Bar without denial, that the *mouth* of the Pantura river is very narrow, there being a sand-bank similar to the Kalany Ganga at Colombo across the river, through which it flows by a narrow passage into the sea. Again the want of evidence on the plaintiff's part to prove that the defendants removed the Nets from the shore is not material. Proof of the direct wrongful taking away is of itself evi-

dence of a conversion, (*Saund.* p. 881;) and it is sufficient that the plaintiffs should have been thereby deprived of their property. The gist of this action is whether plaintiffs incurred any damage or loss *consequential* from tortious acts of the defendants, and whether the defendants could justify their taking away the Nets of the plaintiffs by shewing it arose from necessity, and to save their own and the plaintiff's Nets, (4. *Esp.* 165,) both being then entangled together, and being carried away by the current; but which is not satisfactorily proved. It has been argued by the defendant's Counsel, moreover, that this Court cannot give the costs in the 3rd class, in which this action has been brought, because damages have been assessed in an amount which falls within a lower class; but the Supreme Court has only held that, "The general rule is, that "costs are awarded in the class in which judg- "ment is given, unless special circumstances ap- "pear to take the case out of that rule" (*Kandy, 4th December* 1835 *L. B. p.* 507.) If the rule were not thus qualified, it would prevent this Court from awarding *nominal damages* with costs which in many instances the justice of the case between the parties requires; and the plaintiff moreover often at the trial only seeks for such redress, when it would be absurd to say that he must pay extra costs to the defendant for such leniency. The *test* by which this question should rather be tried as a general principle is, "whether the plaintiff was justified by the *whole result* of the case in bringing his action in the higher class,"—If the suit then appears to have been unreasonably brought in the higher class, or from vexatious or oppressive motives, the plaintiff is very properly made to pay the extra costs which the defendant has thereby incurred. On the other hand if the defendant appears to have been the wrong doer, the Court will often leave him to pay his whole costs of the suit, though it refuses to give any other redress whatever to the plaintiff. In the present instance the Supreme Court entertains no doubt that the right of the plaintiffs to fish on the Colombo side of the river has been

the real cause of the dispute, and that the defendants, in disturbance of plaintiffs' rights, have been wilful aggressors in forcibly removing their Nets, whereby the plaintiffs have been deprived of three of them. Though the plaintiffs have in their libel claimed six Nets of the value of £8, it does not necessarily follow, as argued by their Counsel, that therefore three can only be of the value of £4, because there appears from the evidence to be great difference in the value of these Nets viz. from 15 to 25 Rix Dollars; and the Court would not have been pressing any unfair presumption in evidence against the plaintiffs upon their tortious acts (*Str.* 505) if the full value of the Nets of this description proved (viz. 25 Rix Dollars) had been decreed against them. In assessing the value at a more moderate average price in favour of the plaintiffs, it would be therefore very hard, to thereby deprive the plaintiffs of their costs, which the Court would virtually do if the costs of this action were declared to be payable only in the second class, in which ten per Cent. on the amount in dispute is alone allowed.—[*No.* 30,844, *D. C. Colombo.*]

673.—*Pieris* v. *Coste.*

Adverse possession. Compensation for building and planting.

Judgment;—That the decree of the D. C. be reversed without costs; and the defendant is declared to be entitled to the land in dispute upon her paying to the plaintiff the sum of £3-7-6, due upon the old Judgment of the *Sitting Magistrate's Court*, and also such further sum as the District Court may (in default of the parties mutually agreeing to the same) assess by way of reasonable compensation to the plaintiff for the value of the house built by him upon the land, and for the expences and trouble incurred by him in planting it, as deposed to by the 5th witness; and both parties are decreed to pay their own costs of this suit. The plaintiff has no Notarial transfer, and can rest his claim only on a prescriptive title of ten years adverse possession, which has not been satisfactorily proved. The plaintiff's original title to the land having commenced as a mortgagee, the Law will not without strong proof to the contrary, pre-

sume his possession to be otherwise than consistent with such legal title, and thereby debar the defendant's equitable right to redeem. The circumstance of the plaintiff also never having got a Notarial transfer after incurring the expence of a survey, and his adopting the irregular course of asking the Surveyor to note down the sale in his book, are not in favour of the plaintiff's claim, especially when the Surveyor refused; but laying aside all suspicious circumstances, it appears that this action was not instituted until the 27th May 1839, for previous interruption of the plaintiff's possession by the defendant, but for how long, is not stated in the libel; nor is it very material, because Mr. FRANKE deposes to acts of the plaintiff in 1829, which amounted to an acknowledgement of a title then existing in the defendant to the land; the survey is also dated only on the 23rd June 1829, and the marriage Register Book produced to-day in Court shews that the marriage of the defendant, (which is referred to as the period of the alleged sale) did not occur till the 12th of July 1829. From the same book it appears however that the defendant was born in 1804, so that her alleged minority is untrue, and a mere subterfuge to excuse her great laches in sleeping over her legal rights, so many years, and in not bringing this action sooner; whilst she has in the interval knowingly permitted the plaintiff to continue in uninterrupted possession of, and in good faith to build upon, and plant the land, as the owner thereof; she cannot therefore expect under such circumstances that her claim would not be disputed by the plaintiff, or to be favoured by this Court, in being allowed to benefit by her own laches and deceit.—[*No.* 25,035 *D. C. Colombo*, S.]

674.—*Delbodde Appoohamy* and another v. *Dingihamy.*

Res Judicata. Identity of Parties and Rights.

The simple point for the S. C. to decide is, whether the decrees in the previous cases can be pleaded in bar to the plaintiff's present action, *as heirs of Balhamy*; and this Court is clearly of opinion that they cannot, the plaintiffs not being

parties on the Record in those cases (excepting in the case No. 1242, where the 1st plaintiff claimed, not by inheritance, but by sale and dowry;) and the plaintiff's present claim as heirs of Balhamy, not being put also in issue in the above cases. The cases nevertheless afford strong documentary evidence in favor of the defendant against the present claim of the plaintiff.—[*No.* 3257, *D. C. Colombo.*]

675.—*Ukkoohamy* v. *Menickhamy* and another.

Res Judicata. Parties and Privies.

The Decree of the D. C. is affirmed as to the dismissal of the plaintiff's claim to the estate or share alleged to have belonged to the plaintiff's uncle Ukkoohamy, because the decree in the former suit may be properly pleaded in bar by defendant against all persons claiming title by descent through Ukkoohamy; but as regards the plaintiff's claim by inheritance to the share which his father Balhamy inherited direct from the grandfather Gameralle, and which never belonged to the uncle, the decree in the former suit affecting the estate and title of Ukkoohamy only, cannot be pleaded in bar thereto, though it be strong documentary evidence in proof of defendant's long adverse possession. The case is therefore referred back to the D. C. to hear further evidence on both sides in respect to the said share of the estate alleged to have descended by inheritance from the grandfather Gameralle to plaintiff's father, and from him to plaintiff, and the D. C. will decree accordingly.—[*No.* 3053, *D. C. Colombo.*]

July 14, (C.)

676.—*Andris* v. *Fonceka* and another.

The existence of other debts is no answer to a creditor's suit against an Administrator.

It is clear that the plaintiff's claims as a creditor should not be defeated by the unsupported allegation of the defendants that there are outstanding debts and charges upon the estates, to which the defendants are appointed as Administrators, which will swallow up the whole estate from the heirs. In Simon Fonseka's estate it appears from the list filed by the plaintiff that there are other property to satisfy the bond-debt due to the

first defendant, and the memorandum also endorsed upon the bond of a private transfer of the ⅓ of the garden Karipinchayawatte to the first defendant the Administrator, for his own debt, forms no legal bar to the plaintiff's right; especially as the alteration apparent in the date thereof, and the value of such ⅓ being alleged by the plaintiff to be Rds. 600, or double the amount of first defendant's debt, shew fraud and collusion in the transactions; and this Court suspects that it was made only with the view of defeating the plaintiff's and other just creditors' claims on the share of the family estate due to S. Fonseka. Steps should be therefore forthwith taken to compel a proper account of the two estates being filed by the respective Administrators (the defendants) as there is no excuse for the delay therein which has been permitted for so many years.—[*No.* 5193, *D. C. Colombo.*]

July 28, (C.)

677.—*Ackland* v. *Gomes.*

A settled Account will be opened up on proof of error or oppression.

A Trustee for the recovery of debts is liable for negligence.

Interlocutory order of the D. C. set aside with costs. Looking to the bond of the 6th September 1836, with the Indenture of even date; and also to the subsequent correspondence filed, the risk of the debts in the first instance must clearly be considered to fall upon the defendant. But the Supreme Court does not understand how the amount of the debts due to the "Observer" establishment, (which item is specifically objected to in the Answer) can be justly included in the account against the defendant. A Court of Equity will open a settled account though it has been signed, and a security (as a bond) taken for the balance, upon oppression, and a particular error specified in the pleadings, and supported by evidence. (See *Chitty's Eq. D.* "*Account.*") and the Supreme Court thinks under the circumstances in this case that the "Observer" debts ought to be deducted from the amount to be decreed due to the plaintiff, unless the plaintiff can adduce evidence to satisfy this Court that such demand was not unfairly included in the account. The defendant

moreover having assigned the whole debts to the plaintiff *upon trust* for recovery, it was the duty of the latter to use due deligence for their recovery, not only in instituting actions, but in taking fresh acknowledgments on demand made, or security, so as to prevent the debts being barred by prescription &c; and if any such debts can be proved to be now lost or irrecoverable owing to the laches or neglect of the plaintiff in these respects (and being shop bills, on any such default occurring as aforesaid, the greater proportion must now be liable to be prescribed in law,) the defendant is entitled to have the amount thereof deducted from his debt. A proportionate abatement from the charge of interest upon the whole debt should also be made upon sums received in satisfaction of the debts assigned, as the same were recovered, and also on the amount for bricks, kekuna-nut &c., (otherwise the plaintiff would be charging interest for money actually in his own hands;) and the account filed by the plaintiff is defective herein. Not only upon the above points therefore further evidence must be required, unless the parties by admission agree to dispense therewith, but furthermore the subsequent Deed of Sale, and the original Title Deeds mortgaged should be filed, and evidence must be entered into upon the facts put in issue in the Answer, as to whether such sale was made upon the further consideration, understanding and good faith of the defendant receiving thereon a *general release*, the plaintiff keeping the bills assigned; or else that defendant should thereon have delivered up to him bills of £450 on his executing a bond of £100, which it would appear has not been finally done, owing to the unpaid debts being found since to amount to only £375, when the defendant declined giving more than a bond for £50. The Supreme Court looking to the letters filed, and the apparently very low price of £350 being given as the full value of four seperate fields, with the brick-kiln and buildings thereon, situate at Kandy, is strongly inclined to give credit to the defendant's assertions as to the above price not being the sole consideration, or full value for such transfer, and

that the whole contract has not, (as it ought to have been) completed and carried into effect. If upon taking further evidence, it appear that the above sale was in part performance only of a contract not finally carried into effect or fully completed on the plaintiffs part, as alleged by the defendant, or that the sum given was a very inadequate consideration, and that advantage had been taken therein of the defendant's embarrassment, the sale must be wholly set aside.—[*No.* 13,339, *D. C. Kandy*, S.]

August 21, (S.)

678.—*Sinnatamby* v. *Arnasalam* and his wife.

A. D. C. cannot stop a case on an exception not taken by the parties.

The D. C. should not have stopped the case on reference to the Letters of Administration not having been granted. Parties must conduct their own cases and take their own exception.—[*No.* 6285, *D. C. Jaffna.*]

September 8, (O).

679.—In the matter of the Registry of Marriage between *Paykier M. Cader Meyedien*—Appellant, and *M. Nachen*, daughter of *S. Neyna Marcar*—Respondent.

Consent to Marriage cannot be given by Proxy.

Per Oliphant C. J. " How can the Court decree a marriage to be registered when the consent of the intended bridegroom no where appears, and the bride consents by proxy."—[*No.* 10,243, *D. C. Jaffna.*]

680.—*Wayremottoe* v. *Caderytamby*.

An Action does not lie for including property in an Inventory.

Interlocutory Order affirmed. The plaintiff has not stated in the libel any legal cause of action. No action lies for including property in an Inventory.—[*No.* 10,038, *D. C. Jaffna.*]

681.—*Miera Lebbe* v. *Arlappen Pulle.*

Want of Consideration. Burthen of proof.

Plaintiff cannot be called upon to prove that he advanced the money. Of this the bond is sufficient *primâ facie* evidence, only to be rebutted

by satisfactory evidence to the contrary, which in this case has not been adduced.—[*No.* 8,787, *D. C. Chilaw and Putlam.*]

September 22, (O.)

682.—*Muhammado Cassim* v. *Welley Appa Chetty* and others.

Appeal to Privy Council. Procedure on abandonment.

Mr. Advocate Selby files Power of Attorney of the plaintiff and respondent in favor of *M. L. Alim Hadjiar* and a proxy of the said *M. L. Alim Hadjiar* to Louis Jurneaux Esquire Proctor of this Court, and moves for a Rule Nisi upon the defendants and appellants to shew cause on Wednesday the 10th day of November next, why their Appeal in Council should not be declared abandoned; and why the plaintiff and respondent should not be allowed to avail himself of the judgment of this Court in his favor dated 1st March 1837*, and why the said defendants and appellants should not be decreed to pay the costs of this motion.

Ordered accordingly.—[*No.* 84, *D. C. Manar.*†]

September 29, (O).

683.—*Maria Fernando* widow, v. *Lovento Silva* and others.

Procedure in case of imperfect pleading.

No doubt, in strictness, the defendants are entitled to absolution from the instance. The plaintiff's Proctor has filed a libel which evidently does not set forth the real facts of the case, and which there can be little doubt he could have obtained by questioning the plaintiff. She has not specifically set forth the circumstances of her title by inheritance as she ought to have done. On the part of the defendants, a suit is referred to, the decree in which is not filed, but a Thombo Extract to which no reference is made in the answer. The parties' rights have not properly been brought before the Court. It may turn out that they are not able to set forth any clear title either one side or the other, but as the pleadings are so defective

* Vide *Morgan's Digest* p. 137, par. 463.

† Vide *post* p. 320, par. 688.

they must be struck off the Record, and the District Judge must question the parties, take their oral statement and make up the issue himself by the case, and give judgment anew.—[*No.* 7,960, *D. C. Colombo.*]

684.—*Madelena Fernando* widow v. *Phillippo Fernando*, Administrator &c.,

A Partition decreed in the course of Administration.

It is ordered that the proceedings be referred back to the District Court to call upon the first defendant to pass without delay his accounts as Administrator of his deceased father *Boosabadugey Markoe Fernando*, and to ascertain thereafter whether the plaintiff is entitled to any, and what share, in the garden in question by purchase or otherwise, and to have the garden properly divided, and the plaintiff put then into possession of her just share thereof. It appears that the father has been long since dead, and his heirs have been several years possessing the garden in common according to their respective shares, and that Letters of Administration were granted four years ago to the defendant, so that plaintiff may now fairly seek for an account and partition of his estate.—[*No.* 5502, *D. C. Colombo.*]

October 6, (O.)

685.—*Silva* v. *Jayekade.*

Prescription of Judgments.

JUDGMENT.—That the decree of the *District Court of Colombo No.* 1 *North* of the 9th day of July 1841 be reversed. The Law prescribes the time after which the presumption arises, namely thirty years.

"*Papegaay.*—Vol. 1. page 82. "Sentences of "towns and villages are superannuated after one "year. The Sentences of the Court of Holland "after five years. The Sentences of the Supreme "Court after ten years. The same may not be "carried into execution after such time, unless "execution has been first and previously decreed "thereon."

"*Dutch Law Dictionary*—Vol. 1. page 492. "Lastly although the action on a judgment con-

"tinues for 30 years, as being a personal action, "by reason of which it was anciently called per- "petual, and thus only lost its effect by a prescrip- "tion of the longest time (*longissimi temporis,*) "it has nevertheless been thought right by our "practice, that it should become *antiquated*, that "is superannuated, or of no force, in a much "shorter period, namely to this effect, that after "the lapse of the time fixed, no execution on "account of a Judgment can be sued out, unless "the same has first been anew declared executable, "which is the same as though the first Judgment "were renewed, after the party has first been "summoned there concerning, which time is one "year for the Town Courts; five years for the "Court of Holland; and ten years for the Su- "preme Court."—[*No.* 16,914 *D. C. Colombo, N.*]

October 20, (O.)

686.—*Slyma Lebbe* and another v. *Nicholapulle* and others.

Master and Servant.
A Master not liable for trespass by Servant.

The decree of the D. C. as regards the first defendant was reversed. *Per* OLIPHANT C. J.—It does not appear in evidence that he had anything to do with the wrong; and a man cannot be made liable for a *wrong* done by his servants or others.—[*No.* 9530, *D. C. Jaffna.*]

687.—*Fernando* and another v. *Jumeaux* and another.

Costs of a previous action must be paid before a new action is commenced.

The costs of a former suit which has been withdrawn must be paid, before a new suit for the same claim can be instituted.—[*No.* 8,815 *D. C. Colombo.*]

November 10, (O.)

688.—*Mahammadoe Casim* v. *Welley Appen Chetty* and others.

Appeal to Privy Council.
Procedure on abandonment.

MR. ADVOCATE SELBY produces the Rule Nisi issued in this case on the 22nd September last, calling upon the appellants to shew cause this day why their Appeal to His late Majesty in Council should not be declared abandoned, and why the plaintiff and respondent should not be allowed to avail himself of the judgment of this Court in

his favour dated the first day of March 1837,† and why the said defendants and appellants should not be declared to pay the costs of this motion.

The said Advocate produces these several affidavits to wit.

One of *Louis Jumeaux* Proctor for the respondent verifying that copy of a Rule Nisi obtained in this case was enclosed in a letter addressed by him to *J. G. Hillebrand Esquire*, formerly Proctor for appellants, and that the deponent received the answer hereunto annexed;

Colombo, 8th November 1841.

Sir,

I beg leave to return the Rule Nisi in the Manar Appeal case No. 84 being no longer Counsel for the Appellant in that case; your letter of the 5th instant enclosing the above order was delivered to me only on Saturday last.

I am &c.

(Signed) *J. G. Hillebrand.*

L. Jumeaux Esquire.

One of *Simon Rodrigo* verifying that he was personally acquainted with Palliniappa Chetty who traded in Colombo under the style of Moottoo Palliniappa Chetty; that he has made diligent inquiry after the said Palliniappa Chetty, and that the deponent is credibly informed and doth verily believe that the said Palliniappa Chetty, a defendant and appellant in the Manar case No. 84 left Ceylon to proceed to the Coast, and is not to be found in Colombo, whereby this deponent is prevented from serving this copy and translation of a Rule Nisi obtained in the above case.

One of the said *Simon Rodrigo* verifying that he was personally acquainted Welley Appen Chetty, Supramanian Chetty, Palliniappa Chetty, and Kisnappen Chetty, all of Natta Cottah, the defendants and appellants in the Manar case, No. 84; that they have all left Ceylon, leaving Sellappa, Meyappa, Arnasalem, and Raman Chetties, their respective partners to represent them; further that he did on the fifth day of November

† Vide *Morgan's Digest* p. 137, par 463.

instant serve on each of the said partners, a copy and translation of the within Rule Nisi.

The said Affidavits are read and filed. Mr. Advocate Staples is heard on behalf of the Appellant, and undertakes to produce to-morrow a Power of Attorney with its translation. Ordered that this case do stand over till to-morrow afternoon at 4 o'clock.—[*No.* 84 *D. C. Manar.*]

November 11, (O.)

Mr. Advocate Staples produces two several Powers of Attorney which he afterwards withdraws.

The said Advocate is heard on behalf of the appellant and Mr. Selby on behalf of the respondent.

Mr. Staples moves that the Rule Nisi issued in this case on the 22nd September last be discharged.

Mr. Selby consents.

Ordered accordingly.—[*No.* 84, *D. C. Manar.*]

November 19, (O. C. S.)

689.—*Segoe Lebbe* and another v. *Marcar Mohandrom Salecutty.*

Mahomedan Law.
Divorce among Mahomedans.
Alimony.

The decree of the District Court of Batticoloa is *affirmed* as to the dismissal of the plaintiffs' claim for *Caycoolly* and *Maggar;* the Supreme Court being of opinion that the evidence is insufficient to establish a divorce in conformity with the Special Customs of the Moors concerning Matrimonial Affairs, *Tit II,* appended to *Van Leeuwen.* The Supreme Court however consider that the second plaintiff should be allowed to recover under this action a reasonable sum for maintenance for the time of her separation up to the date of the decree of the District Court; and it is accordingly further ordered that the District Court shall proceed to assess such reasonable sum for maintenance, after hearing the evidence of the second plaintiff and defendant on the point. All parties are moreover decreed to pay their own costs of this case.—[*No.* 6672, *D. C. Batticoloa.* (Coll.)

690.—*Mahammadoe Casim* v. *Welley Appen Chetty* and others.

MR. ADVOCATE SELBY for the plaintiff and respondent files three affidavits. Upon the application of the plaintiff and respondent it is ordered that the security tendered by him shall be produced before the Judges of this Hon'ble Court Collectively at Chambers on Monday next the 22nd Instant at 11 o'clock in the forenoon, and that, if the said Judges shall be satisfied of the sufficiency of the said security the plaintiff and respondent shall be allowed to sue out execution.—[*No*. 84, *D. C. Manar*. (Coll).

Appeal to Privy Council. Security in Appeal.

November 22, (O. C. S.)

691.—*Mahammadoe Casim* v. *Welley Appen Chetty* and others.

On the motion of MR. ADVOCATE SELBY, it is ordered that upon the plaintiff and respondent, or his lawful Attorney, entering into a Bond to the Registrar of this Court in the sum of £2,000 sterling for the performance of the Judgment to be pronounced upon the Appeal which has been noted to his late Majesty the King in Council, and on depositing by way of mortgage the title deeds of the property mentioned in the report of the Appraisers, MESSRS. LOOS and OORLOFF, dated the 23rd day of May 1840 filed in this case, the plaintiff and respondent be allowed to sue out execution for the amount of the Judgment in hi favour and Costs.—[*No*. 84, *D. C. Manar*.* (Colls

Appeal to Privy Council. Security in Appeal.

December 11, (O.)

692.—*Don Louis* v. *R. Allis*.

The Court sitting Collectively has considered the Circular Letter referred to and are of opinion that it is invalid, not being a General Rule or Order of Court and never having been transmitted to

A Circular Letter is not binding as a Rule, unless &c.,

* S. C. Vide *Morgan's Digest* p. 137, par. 463, and p. 142, par. 470. *Ante* p. 211, par. 550. p. 318. par. 682, p. 320, par. 688. *et seq*. And *Post* 30th June 1842.

England for approval as required by the Charter.—[*No.* 8692, *D. C. Galle.*]

693.—*Sibila* v. *Silva* and another.

A. D. C. cannot grant Parate Execution, or appoint a Commission, unless authorized by Law.

Interlocutory order is reversed.—The District Judge has altogether mistaken his powers. Parate Execution cannot be granted in this case, and the Judge of the Supreme Court before whom this case is heard in Appeal does not know by what authority the District Judge appointed the Commission.—[*No.* 7481, *D. C. Galle.*]

694.—*Silva* v. *Juan Naide.*

Qu ? Whether the D. C. can award triple costs.

The decree in this case was affirmed, subject to the opinion of the Collective Court whether the District Court has power to award triple costs, and therefore that point was reserved for Collective decision.—[*No.* 8931, *D. C. Colombo.*]

695.—*Candepermal* v. *Perratey.*

Proceedings on *Ex Parte* Trial.
Qu ? If plaintiff be a married woman.

The 24th Rule of Court directs that if the defendant do not appear, the case shall be heard for plaintiff *ex parte*, the meaning of which is, that the plaintiffs must prove his case; but no proof has been entered into in this case. The Court observes that the defendant is a married woman, if so is it not necessary that the husband be joined in an action of this nature ? And if so let the pleadings be amended and the case proceeded with. The present decree must be reversed in any event for the reason stated above.—[*No.* 7102, *D. C. Batticaloa.*]

696.—*Fonseka* v. *Fernando* and others.

Fernando and others. Intervenients.

Where a party appears by Attorney, the D. C. may require the presence of the party.

In this case the real Intervenients have given a special procuration to an Attorney, and in the ordinary case, that Attorney fully represents the principal; but it is in the discretion of the Judge to require the presence of the principal if he shall so determine. *Voet* Lib. 3. Tit. 3. § 14. "*Intervenire potest procurator in omnibus causis civilibus, nisi circumstantiæ exigant ipsius domini præsentiam.*" The Judge here finds that by the Rules of Court the presence of the principals themselves is required, and he is entitled to en-

force it. Decree of D. C. is *affirmed.*—[*No.* 7416, *D. C. Colombo.*]

December 30, (O. C. S.)

697.—*Arampolle Unanse* v. *Maha Naike Unanse*.

Appeal to Privy Council. Procedure.

Mr. H. Staples moves that the proceedings in this case may be renewed in the *District Court of Kandy. South,* in terms, of the motion made by Mr. J. Staples at the last Eastern Circuit for the purpose of the case being prosecuted in Appeal to Her Majesty in Council.

Ordered that this case be brought before the Court on Monday next the 3rd Proximo, leave being given to Mr. Staples to make this or any other motion on that day which he may deem expedient, giving reasonable notice to Mr. Beling the Counsel for the opposite party.—[*No.* $\frac{646}{1019}$ *D. C. Kandy*, N.]

January 3, 1842, (O. C. S.) 1842

698.—*Antochy* and her husband v. *Maria*, widow and Administratix.

Where a legacy was intended as a satisfaction for an inheritance, *held* that the legatee cannot claim both.

It is clear that the Testators gave the property to plaintiff as her *inheritance*, she is therfore not entitled to claim it as a *legacy* and claim her *inheritance also.* [*No.* 3626, *D. C. Batticaloa.*]

699.—*Kiri Ettena* v. *Appoo Naide.*

The S. C. refused to entertain an objection which was not made a ground of appeal.

No appeal having been taken against the Judgment overruling the objection to the non-joinder of the husband, the Court did not entertain the question. [*No.* 2364, *D. C. Matelle.*]

February 4, (S.)

At Chambers,

700.—*In rê Donald Davidson Esq.* Merchant.

Injunction to restrain sale of goods.

On reading the affidavit of *Donald Davidson* of Colombo and upon the motion of Mr. Advocate Henry Staples on behalf the said *Donald Davidson.* It is ordered that an Injunticion do issue against the Collector of Customs at Galle, the Controller of Customs for the Southern Province, and to all and every other person or per-

sons acting on their, or either of their authority, so desist from selling the following goods to wit;

2 Cases manifested as sundries.
18 Chests manifested to contain opium.
119 Bales of Cotton.
33 Casks with salt provisions in them;

until the decision of any suit that may be instituted relative to the said goods or until this Court shall make other order to the contrary.

May 27, (O.)

701.—*Juse Fernando* v. *Juanis Sielve.*

The right to cut down over hanging branches, is a Common Law right.

This case was remitted to the District Court to assess the damages done to plaintiff's roof by defendant's cocoanut trees, if any; with permission to defendant to call evidence if he shall be so advised to prove that plaintiff's house or any part thereof, is on defendant's property; and leaving to plaintiff to exercise his Common Law right of cutting off any boughs or parts of trees which overhang his premises, and that judgment be given thereupon.—[*No.* 7705, *D. C. Colombo.*]

May 31, (O.)

702.—*Silva* v. *Christoffelsz.*

Joinder of parties ordered, on appeal.

The necessary parties not having been all joined, it is considered that the decree of the District Court be set aside and the purchaser made a defendant.—[*No.* 7561, *D. C. Colombo.*]

703.—*Senewiratna* v. *Senewiratna.*

The Court will not interfere with the proceedings of an Administrator, except on a regular application.

An applicatian is made to the Court to cause the Administrator to deal with the Estate in a particular way. This cannot be done; the proceedings must be quashed; the parties to which must pay their own cost. If any party thinks the Administrator is about to sell the Estate not having power so to do, he may restrain the Administrator by injunction,—[*No.* 277, *D.C.Colombo.*]

June 1, (O.)

704.—*Kolomboogame Vidahn* v. *Lokuhamy* and others.

No proxy is filed from the 3rd defendant either to *Rebeira* or *Fernando*. How then do we find their names to pleadings purporting to be an admission and an answer? Either the Proctor who holds proxy or the party must sign; but not both. The Secretary should take no pleading except from a party or proctor holding a proxy, or his clerk. In the former case the party's name alone must be affixed or his mark. In the latter the proctor's name alone. In this case the defendant must be allowed the benefit of his answer, and the judgment must be reversed.—[*No.* 3581, *D. C. Colombo.*]

Pleadings should be signed either by the party himself, or a Proctor holding a proxy.

June 7, (O.)

705.—In *rê Assen Lebbe Marker*. *Neyna Markan* v. *Neyna Markan*.

The Assessors being of opinion that a young man of 21 years of age is quite competent to manage the affairs of the Estate, and that the peace of the family will be much better kept and the general interests forwarded by the appointment of the applicant, the order of the District Court must be reversed and Letters of Administration be granted to the applicant; costs to be borne by the Estate.—[*No.*32,296, *D.C.Colombo.*]

Mahomedan Parties.
Grant of Administration to a young man of 21.

June 9, (C.)

706.—*Rajepakse* v. *Dingeirihamy*.

Judgment. That the decree of the District Court of Colombo No. 6 of the 23rd day of May 1841, be reversed with costs, and that the plaintiff be decreed to be entitled to the lands in dispute as being the sole proprietor of the Nindegamme Kanuggale, to which they belong; and that the defendant accordingly be decreed to pay to the plaintiff as tenant of the above Nindegamme the sum of £6 for Ottoo, and value of services due on account of the above lands. And it is further decreed that on the defendant's failure to pay the

Forfeiture of Nindegamme decreed on default of paying Ottoo.

said sum within three months from the date of this decree, that she be ejected from the said lands and the plaintiff be thereupon put in possession thereof.—[*No.* 2633, *D. C. Colombo.*]

707.—*Kirie Hattena* v. *Kirri Hattena* and others.

Plaintiff condemned in the costs of Defendants, who have been vexatiously made parties.

The decree of the District Court is *affirmed* except as to costs. It being decreed that the first, second and third defendants do pay their own, and the plaintiff's costs; but that the plaintiff do pay the costs of the seventeen other defendants, as they appear to have been vexatiously made parties to this suit by the plaintiff, and it would be very hard to make the three first defendants therefore pay these unnecessary additional costs. —[*No.* 3657, *D. C. Colombo.*]

June 11, (O.)
708.—*Maymo* v. *Cando* and another.

Witnesses living 4 miles of the Court not entitled to Batta.

The Interlocutory Order of the District Court is reversed, as it appears by the Rules that witnesses are in no case entitled to bâtta if they live within 4 miles of Court.—[*No.* 6206, *D. C. Colombo.*]

709.—*Don Carolis* v. *Alwis.*

Where Sureties have been illegally proceeded against their remedy is by action.

It is considered that there is no order of the District Court on which to ground an appeal. The securities appear to have been illegally proceeded against and they have their remedy by an action at law.—[*No.* 4898, *D. C. Colombo.*]

June 15, (C.)
710.—*Kirri Menika* v. *Mirapêttia.*

Kandyan Law.

An only daughter by a previous marriage is entitled to half the father's lands.

Judgment. That the decree of the District Court of Colombo No. 6 of the 22nd day of May 1840 be affirmed with costs, the plaintiff being entitled as the only daughter of *Tickery Mudianse* by his first marriage to half of his lands.

The Supreme Court considers the Deeds of both parties wholly undeserving of credit, the Exhibit A. filed by the plaintiff being of a very suspicious character and unsatisfactorily proved, and the Exhibit B. filed by the defendant having been already set aside in the former case 2779, on account of the signatures of the grantor and attesting witnesses not being written thereon, so that they have clearly been fradulently added since; from the whole evidence however the parties are satisfactorily proved to be both daughters of *Tickery Mudianse* by separate marriages, and his widow *Lokohamy* having possessed a life interest in his Estate, the defendant cannot maintain now any prescriptive title against the plaintiff's claim, (as recorded by the District Court on the further proceedings) because the plaintiff acquired a right of possession only upon the widow's death which has happened within 10 years, and the proviso at the end of the Clause 2nd of the Ordinance 8 of 1834 expressly declares, that the term of prescription shall only begin to run against parties having estates in remainder or reversion from the time they acquire a right of possession. A question of Law has been also raised by the Proctor for the appellant, whether the plaintiff, has not lost her right to her father's property by her *Deega* marriage, (which is fully proved;) and the defendant being married in *Beena* is therefore entitled to succeed to the whole of his property; but it is laid down in *Mr. Sawers'* Digest of the Saffragam Customs p. 89, that "the daughter being the only child of a "man's first, second, or third marriage, will "have equal rights with her brother of the half "blood in her father's estate, even if given out "in *Deega*," and as a sister of the half blood married in *Beena* could clearly have no preferable claim to the brother of the half blood, this Court considers that the plaintiff is entitled to an equal share with the defendant in their intestate father's land.—[*No. 2765, D. C. Colombo.*]

Prescription does not run against the heir pending the widow's life-interest.

An only daughter does not forfeit her rights by a *Deega* marriage.

June 16, (S.)
At Chambers.

711.—In the Matter of *Anthonetta Conderlag.*

Injunction to r...ain waste.

Anthonetta Conderlag alias *Anthonetta Perera* appearing in person is sworn to an Affidavit.

Ordered that the said Affidavit be filed,

MR. MARTENSZ appears on behalf of the said *Anthonetta Conderlag* alias *Anthonetta Perera*, and moves for a Writ of Injunction directed to the Agent or Acting Agent of Government of the Western Province, his Assistant or Assistants, and to all persons concerned directing him, and each of them to desist from cutting, rooting up, or otherwise destroying the trees and plants growing in the garden situated and lying in the Dam Street of Colombo and in which the house at present occupiod as the office of the said Agent stands.

Ordered accordingly.*

June 25, (O.)

712.—*Slema Lebbe* v. *Leva Markan.*

Where the property sequestered is sufficient to cover the judgment and costs no security will be required in appeal.

In this case the Supreme Court on reading the Petition of the defendant, ordered that leave be given to the defendant to proceed in the prosecution of the appeal noted by him without giving security for the amount of the judgment or for the costs in appeal; provided it be made to appear to the satisfaction of the District Court, that the property of the defendant which has been sequestered at the suit of the plaintiff in this action, is sufficient to satisfy the amount of the said judgment, and such costs as the plaintiff may probably be put to in prosecuting the said appeal.—[*No.* 8259, *D. C. Colombo.*]

June 30, (O.C.S.)

713.—*Mahamadoe Casim* v. *Welley Appen Chetty*, and others.

Appeal to the Privy Council.

A surety dying, the S. C. will accept another in his stead.

It is ordered that the Appeal to Her Majesty in Council be allowed on giving another Security in lieu of the one who is dead.—[*No.* 84, *D. C. Manar.*]

* The Writ of Injuction issued in this case was subsequently (23rd June 1842) dissolved.

714.—*Ishmael Lebbe* Admr. v. *Minne Markar.*

At what stage, a party ma interv

It may be doubtful whether there is any reason to suppose that any mistake has occurred in framing the 32nd Rule, because it is in strict accordance with the Roman-Dutch Law on the subject " *Non etiam interest, quo loco jam lis sit, &c.* (*Voet.* Lib. 5. Tit. 1. § 36.) The Judgment which prevents the party from intervening on account of doing so at too late a stage of the proceedings is reversed, saving to all parties all other objections. [*No.* 31,533, *D. C. Colombo. S.*]

715.—*Bastian Appoo* and another v. *Baba Appoo* and another.

Where a deft. is sued as heir or representative, the libel must shew that he is sole heir, or how he is a representive.

The plaintiffs sue defendants as heirs and representatives, not stating that they are sole heirs or how they are representatives, as Executors &c. The defendants neither admit nor deny the allegation. The lands are not mortgaged. The decree of the District Court is therfore set aside, and the plaintiffs are allowed to amend their declaration within fourteen days from notice given of this decree (otherwise defendants to be absolved from the instance) and the defendants to answer in due course and the case to be proceeded with. [*No.* 33,878, *D. C. Colombo. N.*]

September 14, (O.)

716.—*Anna Hamy* and another v. *Madelena Fernando* widow.

Where the libel was unintelligible, the S. C. absolved the defendant.

The libel being unintelligible, the decree of the District Court was set aside and the defendant absolved from the instance. [*No.* 8342, *D. C. Colombo.*]

September 15, (O.)

717.—*Silva* and another v. *Fernando* and others.

Action against Auctioneer.

The purchaser is not made a party to the suit, the Auctioneer is; he must be absolved from the

instance with costs, and the case is remitted for the purpose of the purchaser being joined. [*No.* 8907, *D. C. Colombo.*]

718.—*Perera* v. *Soseuw* and others.

Form of suing on behalf of a wife.

The wife should not be joined as co-plaintiff, and the Court amends the title of the cause by adding to the plaintiff's name the words "*who sue for, and on behalf of Dona Bastiana Hamine his wife*" the usual form in like cases. [*No* 32,761*s* *D. C. Colombo N.*] .

719.—*Batagedere Gooneratne Unanse.* v. *Battagedere Unnanse.*
Seidarte Unnanse. Intervenient.

Succession to Temple property.

The decree of the District Court in this case was *affirmed*, subject to the opinion of the Judges, whether the plaintiff as pupil of Godegamuwe Unanse had any and what right? Whether the the bequest of Marepane to defendant does not become void on defendant's becoming a *sectarian*? Whether the property does not devolve to any pupils of Marepane if any such are in existence? Or whether the property does not lapse to the donors and their heirs, or to the Crown? And subject to their opinion on any other point. which they may discover. In the meantime the case was referred to the District Court to ascertain, whether the defendant was professedly of the *Amarapoore* sect at the time of the date of the Deed of Sacca 1743 from Marepane to defendant? [*No.* 2746, *D. C. Colombo.*]

October 6, (C.)

720.—*Cattayen Chetty* and another v. *Arnasalem Modliar.*

The Law of Namptissement, considered.

The two principal questions raised on this appeal, viz. 1st. Whether the Law of Namptissement has been introduced into and is in force in this Colony? and 2ndly Whether the District Court

can grant Provisional Sentence for payment thereunder, when no mention thereof, or of the form of process thereon is contained in the General Rules and Orders for regulating the practice of the District Courts, are both points fully settled by the previous decisions in the case of *Gibson* v. *Rodney* 12th November 1830.* *Clarke* v. *Segodeen Lebbe Marcar* decided on 11th November 1835,† in Colombo Appeal 8425; and in Galle Appeal 2532,‡ decided on 9th April 1836.

The Proctor for the Appellant (Mr. Richard F. Morgan) has waived the other objections taken by him in the District Court, excepting that he contends that Provisional Sentence for payment cannot be granted in the present stage of this suit, the defendant not having filed any answer on the general merits, nor issue having been yet joined thereon between the parties; and also that the defendant is entitled in this, as in ordinary cases, to the usual time allowed for answering viz. 8 days. This Court is however of opinion after referring to the authorities cited, that wherever a summons with a copy of the instrument upon which the claim for Provisional Sentence or Condemnation for payment under security *de restituendo*, is prayed for in the libel, has been personally served upon the defendant calling on him to appear on a day certain named therein, and to then acknowledge or deny his handwriting or signature to such instrument, and to shew cause if he has any, why Provisional Sentence for payment should not be granted thereon, the defendant must on appearing on the day so fixed for hearing of claim for obtaining Provisional Sentence peremptorily answer by verbal pleading to such claim for Provisional Sentence; and if the defendant shall upon examination acknowledge his hand writing or signature

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* *Lorenz's Treat: on Namptissement.* p. 1.—*Mar. Judg*, p. 425 par. 2. et. seq.

† *Lorenz's Treat: on Namptissement.* p. 5,—*Mar. Judg.* p. 430. par. 4. et. seq.—*Morgan's Digest p.* 60. *par.* 258.

‡ *Lorenz's Treat: on Namptissement.* p.14. *Morgan's Digest* p. 77. par. 321.

to the said instrument, and shew no sufficient cause why Provisional Sentence should not be granted thereon, as prayed for, the plaintiff would be then entitled to such Provisional Sentence. But if the plaintiff omitted to serve with the summons, a copy of the instrument upon which the claim for Provisional payment was grounded, then the defendant would be entitled to demand such copy and a sight of the instrument previously to answering, and should be also allowed in such case until the next day, or some other early convenient day, to be then fixed by the Court, to answer to the said claim of the plaintiff for Provisional payment.

This Court must here repeat, what it has expressed in a former decree, that so far from the Law and Practice of Namptissement not being suited to the mode of administering Justice in this Colony, it seems to go hand in hand with the main objects, which the system of Judicature under the present Charter has in view, viz. speedy decision, and the extracting as much as possible of the facts from the lips of the parties themselves; and the provisions in the Rules of Court for the mutual examination of the parties, and that their verbal statements when reduced into writing, should be taken as the pleading of such parties, may be particularly noticed. In respect to the Dutch Civil Law authorities, the Court has relied chiefly on *Voet.* Lib. 42. Tit. 1. §6—14.—*VanderLinden* pages 407 and 419, and *VanLeeuwen* pages 586 and 699.—[*No.* 35,001, *D. C. Colombo, N.*]

721.—*Demmer* v. *Van Eyck.*

On Amendment of Libel, a fresh summons ought to issue.

Practice of Namptissement.

In this case the Order of the Court below was reversed without costs. *Per* Carr J.—The practice is, where a plaintiff amends his libel after answer, and requires a further answer from the defendant to such amendments, he must take out a fresh summons for the defendant to appear and answer to the amended libel; and when Provisional Sentence for payment under security *de*

restituendo is prayed for by the libel, the defendant may be called on to plead by verbal answer to such claim without the delay and form of filing a written answer thereto according to the Rules of Court in ordinary cases; and the Court may thereon grant such Provisional Sentence without issue having been joined between the parties on the general merits. The proper course in this case is for the plaintiff to serve a fresh summons on the first defendant annexing thereto copies of the amended libel, and of the instrument upon which the plaintiff's claim for Provisional Sentence is founded, calling on the defendant by such summons to appear and answer on some certain day to the plaintiff's claim for Provisional Sentence; contained in such amended libel, and to acknowledge or deny his signature to the said instrument, and to shew case if he has any, why Provisional Sentence should not be granted as prayed for, when, if the defendant appears on the day so fixed for hearing claim for Provisinal Sentence, and acknowledge his signature to the said instrument, the plaintiff would be entitled to Provisional Sentence thereon; unless the defendant could shew either on the facts alleged in the libel, or inspection of the instrument, that the plaintiff is not entitled to Provisional Sentence thereon; or unless the defendant then produce some instrument or document in the handwriting of, or signed by the plaintiff or obtain admission by the plaintiff, upon his being then examined, from which the Court shall be satisfied that the plaintiff is not likely to succeed in the ordinary action.—See *Voet. Lib.* 42. *Tit I.* § 6.—14 — *Vander Linden* p, 407 and 419 and *Van Leeuwen* p. 586 and 699; and *Clarke* v. *Segodeen Lebbe Marcar* decided on 11th November 1835; in *Colombo Appeal No.* 8423; and the *Galle Appeal No.* 2532 decided on the 9th April 1836.

As the plaintiff applied for and was refused a fresh summons in the District Court, both parties are decreed to pay their own costs of this Appeal. [*No.* 35,460. *D. C. Colombo, S.*]

October 13, (C.)

722.— *Polinga* v. *Christia.*

A party cannot cut a ditch on his own land so as to injure his neighbour's fence.

The proceedings in this case were remanded back to the District Court to hear further evidence on both sides and to decide the case *de novo*. *Per* Carr J.—The rule in Law is "*Prohibetur, ne* "*quis faciat in suo, quod nocere possit alieno, et* "*sic utere tuo, ut alienum non lædas.*"—The defendant has clearly no right to dig a new ditch upon his own side to close to the plaintiff's partition fence, as to cut the roots thereof and cause it to fall; and the neglect also of the plaintiff immediately to repair the injury so done to his fence, would not defeat his claim against the defendant for damages occasioned by, or consequent on the above wrongful act of the defendant. The plaintiff moreover has not examined his witnesses as to the amount of damage suffered by him; and the main point in the case also appears to have been overlooked, viz.—Whether the defendant had cut a fresh ditch, or had re-opened only an ancient ditch, which had been wrongfully filled up by the plaintiff. [*No.* 8284, *D.C. Colombo.*]

October 22, (C.)

723.—*Langslow* v. *Whiting.*

Grounds for transferring a suit from one D. C. to another.

William Gardiner Cumming is sworn to an Affidavit which is read and filed.

William Henry Whiting appearing in person affirms to an Affirmation which is read and filed.

Mr. Cumming on behalf of the said *W. H. Whiting* thereupon moves upon the facts set forth in the said Affirmation and in the said Affidavit, that an order may be pronounced transferring the above suit from the *District Court of Colombo No.* 1. *South* to the *District Court* next adjoining thereto, for the hearing and decision of the said suit in terms of the 36th and 46th Clauses of the Charter, and further moves for

such further order as to this Court may seem meet.

Mr. R. Morgan appears on behalf of the plaintiff opposes the said motion and he is heard.

Mr. Cumming is heard in reply.

The Assessors deliver in their opinion that the case in question ought not to be transferred from the *Disrict Court of Colombo No. 1. South* to another *District Court of Colombo* because "*Mr.* "*Langslow* the District Judge is a Lawyer and he "knows more Law than any other District "Judge, and because there is a report that he "does justice in every case which comes before "him."

The Court dissents from the opinion of the Assessors, because it considers, as a general rule, whenever a party objects to a District Judge acting in a case, upon a ground which would be good cause of challenge to him as an Assessor under the 6th Rule of Section VII, viz; "on the ground of direct interest or near relationship to one of the parties," the Supreme Court ought upon the application of such party to transfer the cause to the next adjoining District Court under the provisions of the 36th and 46th Clauses of the Charter. The District Judge in this instance is objected to by the defendant as being the father of the plaintiff, living together in the same house; and as having also expressed a pre-conceived opinion against the defendant upon the principal point put in issue in this cause. The several authorities cited by the defendant's Proctor from Dutch and English Law Writers are very strong, as shewing that a Judge ought not to be allowed to try a cause where he stands in such close relationship to one of the parties, as father to son; and the Court connot be guided in this matter by report or rumour which the Assessors state as the reason of their opinion, nor could the Court admit any legal evidence on the point, whether any District Judge thus objected to, was more or less likely from his general character to be actually biased by his being so close-

ly related as father to one of the parties. The Law presumes partiality in such cases, and that every one has the natural feelings and bias from such close relationship, which it generally intends to guard against; and on public policy it will not allow any individual under such circumstances to discharge the public duty of a District Judge, an Assesor, or a Juror. The Court therefore orders that this case be transferred from the *District Court of Colombo No. 1. South* to the *District Court of Colombo No. 4. Caltura.* [*No.* 36,943, *D. C. Colombo S.*]

October 27, (C.)

724.—*Delkandura* v. *Hathanghamy* and others.

One of several co-heirs may sue for his share.

The proceedings are referred back to the District Court to hear further evidence and to decide the case *de novo*; with liberty to either party to produce in evidence the Hee Lekam Mitiya, and Commutation Register of the District at the further hearing. By the Dutch Civil Law "notwithstanding any one has joint partners in one "and the same cause, he may sue any one at law "for his share alone, or be sued by another." (*Van Leeuwen* Bk. 5. *ch.* 3. §. 11. *p.* 524.)—And accordingly it has never been the practice in this Colony to require all the co-heirs or joint-owners of land to sue together; and if they were compelled to do so, it would in some Districts owing to the minute subdivision of landed property and the number of co-heirs, be tantamount to a total denial of justice, as it would be impracticable in many instances to get all the heirs to join as co-plaintiffs or else to appear as co-defendants or intervenients, whilst it would be also attended with the most ruinous expence to poor parties. The plaintiff does not moreover in his libel distinctly allege himself to be the *sole proprietor*, though he seeks the rent and services due to himself without mentioning that there are other co-heirs, but he can only recover his own share in

this suit; and if he clearly had claimed in his libel more than was due to him, it would only affect his right to costs. It would certainly be preferable however if the other joint-owners to the Nindegame (being few) were parties to this case; and should they refuse to intervene on having notice, the plaintiff shall be at liberty to amend his libel by making them co-defendants, if he be advised to do so by his Proctor.—[*No.* 336, *D.C. Colombo.*]

November 3, (C.)

725.—*Handakanda* v. *Yahapathamy* and others.

The D. J's. signature is necessary to every Order.

It is considered that the Orders of the District Court be set aside, not being signed by the District Judge, and that the defendant's appearance be properly entered and the answer be thereon received. Under the 7th Clause of the Rules the District Court might also have granted redress. —[*No.* 4261, *D. C. Colombo.*]

726.—*Ismael Lebbe* v. *Leva Marken.*

Variance.

The variance between the Libel and the statement of the plaintiff upon his examination in respect to whether the plaitiff paid the money himself or paid it through his son, is not fatal, because the rule "*Qui facit per alium facit per se,*" may applied there; but the District Court will do well to consider the circumstance in judging hereafter on the credit due to the plaintiff's evidence in proof of the payment of the £15. At the same time this Court is inclined to make great allowance to the plaintiff thereon, from his Libel having been so shamefully drawn out by his Proctor, who wholly forgets that brevity and clearness are the principal features of good pleading, whereas the Libel is most unnecessarily lengthy and confused; and the Proctor is disallowed accordingly his costs thereof beyond the first sheet of 120 words. [No. 8319. *D. C. Colombo.*]

November 10, (C.)

727.—*Perera*, Admr. v. *Don David.*

Practice, in cases where a Plaintiff is unavoidably absent on the day of Trial.

If the plaintiff can satisfy the District Court that he attended during the day fixed for trial, and was delayed at the ferry, the case shall be restored to the List of Cases pending for Trial in the said Court, upon the plaintiff's paying the defendant's costs of the dismissal in the District Court, and also of this Appeal. The plaintiff has not been dilatory in the previous proceedings, and his present excuse appears a plausible one, whilst he is entitled to some indulgence from his suing as an Administrator, otherwise no one would incur the liabilities of that office. The practice moreover in the Districts Courts in Colombo is not to strike any case off the List for default of the plaintiff's attendance until the rising of the Court, the cause on the absence of parties being postponed to the bottom of the List for the day; so that if the plaintiff should attend during the sitting of the Court on that day, and be ready to proceed, the case would be then heard, though the plaintiff might be reprimanded probably for not attending earlier.—[*No.* 9028, *D.C. Colombo* No. 4.]

728.—*Mally* and another v. *Kirribatta.*

Stale Writs.

Presumption of payment.

The proceedings in this case were remanded back for the District Court to hear proof on both sides, as to any of the property seized under the former Writ of Execution having been delivered over to, and received by the plaintiff in satisfaction of his demand. And *Per* Carr J.—This Court is not inclined to favor these stale demands after a lapse of ten years under old Writs of Execution for the recovery of petty sums, especially if it can be shewn, that the defendant has for a long time with the knowledge of the plaintiff been openly in possession of the property which is now sought to be seized under the renewed Writ, as a presumption would arise from the plaintiffs' laches during so many years, of the debt being satisfied; though the demand be not barred by prescription.—[*No.* 5971, *D. C. Colombo.*]

729.—*Don David* v. *De Mel.*

The Interlocutory Order of the District Court is *affirmed.* The plaintiff has not, on the motion, complied with the 4th Rule, which requires any such motion to amend pleadings, to be made upon an affidavit of merits "or other sufficient cause shewn to the satisfaction of the Court." The plaintiff's Proctor (Mr. VanHaght) is ordered to pay the costs of the said motion, and of this appeal. [*No.* 4201, *D. C. Colombo.*]

Motion to amend must be upon cause shewn.

December 5, (C.)

730.—*Tamel* v. *Isa*, widow.

The plaintiff should amend his libel by stating that his father died intestate and that the plaintiff was his sole heir, and had succeeded accordingly to all his Estate. The heir or personal representative of the deceased husband of the defendant should also be made a party co-defendant, if he also has died intestate, and she has not taken out Administration. [*No.* 8685, *D.C. Colombo.*]

Allegation of intestacy, where the Plff sues as heir.

731.—*Perera* v *Lokoo Manika*, widow.

The decree of the District Court is set aside for irregularity, and the defendant to be admitted to enter her appearence and answer. It does not appear on the Record,—excepting by the statement thereof in the Proctor's motion, and in the Petition of Appeal,—that the notice of motion for Judgment was actually served; and if only the notice in *English*, which is filed in the proceedings was served without any Cingalese translation or copy thereof, as stated in the Petiton of Appeal, it is certainly not "*due notice*" as required by the 7th Section of the new Rules. [*No.* 4224, *D. C. Colombo.*]

Service of a notice in English on a Cingalese party, is not "*due notice.*"

732.—*Deeningey* v. *Menikhamy* and others.

Examination of Witnesses not on the List.

That the decree of the District Court be reversed, and the case be set down for further hearing, when the witness objected to will be examined together with the other witnesses on the parties' lists, whose evidence the parties may respectively wish to be taken and the Court will then decide the case *de novo.*

The District Court should have acted under the 28th Clause Section 1. wherein it is provided that, "no party shall be precluded from calling "and examining any witnesses whom the Court "shall consider necessary for his case, though "their names should not appear on the list of "witnesses, and though they should not have "been regularly summoned by citation." The defendant in this instance could not fairly urge that there has been any surprise upon him, or that he was really misled or doubtful, as to who the witness was, so that he could not make any previous enquiry about him, and come prepared with evidence to discredit or rebut his testimony; the District Court therefore,—as he was a most material witness for the plaintiff's case—ought to have admitted his evidence. [*No.* 2783, *D. C. Colombo.*]

December 7, (C.)

733.—*Vally Kahn* v. *Corjie Canjie.*

Power to advance cases on the Trial Roll.

The Interlocutory Order and Judgment of the District Court in this case were set aside with costs, for irregularity; and the proceedings were remanded back to re-examine the witnesses who gave their evidence on the 13th October (the date of the judgment,) and to take such further evidence as the parties might wish to adduce, and to give judgment *de novo.* And *per* Carr J.— "The 9th Section of the new Rule of the 2nd July 1842 requires causes to be entered in a Book or List of Cases for Trial, in the order according to priority of time, in which they are brought to be

entered; and that the said causes shall be called on, heard and tried, in the order in which they shall have been so entered. The District Court therefore has no power to advance this cause in the list for hearing, or to take it out of its usual order, without the consent of both parties." [*No. 26,203, D. C. Colombo S.*]

December 8. (C.)

734.—*Don Abraham* and another v. *Punchy Hamy*, Admx. of the Estate of *Don Andris* deceased.

Gentotte Appoo and others. Intervenients.

One of several co-heirs may sue the Administrator for his share.

Claiming more than is due is no ground for dismissal, but may affect the costs.

This case is remanded back to the District Court for the second Intervenient to file a proper Petition of Intervention setting out his respective title, and for the other parties to file their answers thereto, when the District Court is to decide the case *de novo* upon evidence. *Per* Carr J. —The plaintiffs as two of the next of kin had a right to bring this action against the Administratrix for their shares of the intestate estate, without joining all the other next of kin or co-heirs, as co-plaintiffs;—(*Van Leeuwen* Bk. 5. Ch. 3. § II. p. 524.) And if the plaintiffs by their libel claim more than their share, it may affect their claim to full costs. but it should not deprive them from recovering what is due to them with costs according to the value of their real share or in the class in which judgment is given for them. It is obvious also that the main point in issue, is whether Don Andris possessed the *whole* or only *one-fourth* of the property in dispute, and not whether there were other next of kin or co-heirs to Punchy Hamy besides the plaintiffs. The joinder of the second Intervenient as co-plaintiff would not therefore have probably obtained an admission of the plaintiffs' real claim by the defendant and first Intervenient as suggested by the District Judge. [*No. 21,550, D. C. Colombo N.*]

735,—*Wawa Saibo* Moorish Priest v. *Bawa Saibo* and another.

Mahomedans.

The proceeding are referred back to the Dis-

Right of Moorish Priests, under acts from Government, discussed.

trict Court to require the plaintiff to produce in evidence his alleged appointment in writing from the Government. The defendant shall be at liberty also to put in evidence,—if he be so advised, on inspection of the decree of the District Court,—the judgment in former suit No. 2466, wherein it appears that the plaintiff failed to establish his exclusive right by custom to perform the marriage ceremony amongst the Moors at Negombo, and the whole proceedings in the above suit shall thereon be appended as a connected case to these proceedings and returned therewith to this Court for its final decision on this appeal.

Notice of this action should moreover be given by the plaintiff to the Government Agent, in order that the Government may intervene in the case, if it think proper to maintain its sole right of appointing the Moorish Priest at Negombo, as well as to adduce any further proof in its power, that the Priest so appointed by it, or the Priests acting under his license or permission, can alone perform the marriage ceremony amongst the Moors in Negombo.—[*No.* 7659, *D.C.* Colombo.]

December 9th, (C.)

736.—*Francina Fernando* widow v. *Adrian* and others.

Res Judicata.

Prescription if not pleaded, will not be held as a bar.

The decree of the District Court of Colombo is *affirmed* as to the dismissal of the plaintiff's claim to the garden, because the decree in the former suit No. 11,324 is conclusive against the plaintiff's right thereto, and she cannot seek to set aside such decree in this case, although it may really have been founded upon wrong evidence.

In regard to the plaintiff's right however to recover back the purchase money of £4—10, the defendant has not pleaded in bar the proper Clause of the Ordinance for Prescription of it, and as the Court never favors such a defence against an apparently just claim, so much of the decree as dismisses the plaintiff's claim to recover repayment of the said purchase amount of £4

-10,is set aside, and the proceedings are remanded back to hear evidence on both sides as to the same, and to decide the case *de novo* thereon. [*No.* 316,3, D. *C. Colombo.*]

December 12, (C.)

737.—*Sirrewardene* v. *Ranghamy,* widow. This case was remanded back to the District Court to hear the evidence on both sides as to the plaintiff being the only son of the deceased Arawegeddere Naide Hamy by his first marriage. And *Per* Carr J.—The evidence hitherto taken in respect to the deed filed by the defendant is very doubtful and suspicious, though the defendant's witnesses are the most credible, especially as the Olah does not appear to be a new one; but by the Kandyan Law it is clear that the only son and heir cannot be disinherited by a voluntary Deed of Gift, or Will, unless the cause of disinherison be expressly mentioned in it; and if the plaintiff be satisfactorily proved to be the only child of the deceased Arewegeddere Naide Hamy by his first marriage, this Deed would be wholly void against him, and he would be entitled notwithstanding it, to succeed to his father's lands, subject to the life interest therein of the defendant, as his father's widow; unless by mutual agreement they like to divide the estate by taking half each [*No.* 3262, *D. C. Colombo.*]

KandyanLaw. An heir cannot be disinherited, without cause of disinherison stated in the Deed. Widow's Life-Interest.

December 16, (O. C. S.)

738.—*Charles Delegal* Agent and Attorney of *F. Lambe* and *E. J. Darley Esquires* of Colombo. Assignees to the Estate of *E. H. Brook* a Bankrupt—Plaintiff and Appellant.

v.

James Davidson—Defendant and Respondent.

The Power of Attorney given to the Appellant does not entitle him to appear in Court for his Principals. The Charter expressly declares that no person can appear, plead, or act for another as Advocate or Proctor unless admitted and enrolled as such. [*No*· 13,884, *D. C. Kandy, S.* (Coll.)

An Attorney cannot sue, unless expressly authorized.

THE END.

1843.—*January* 14, (C.)

739.—*Wedda* v. *Balea.*

There are no prescribed forms of adoption under the Kandyan law, which are, nevertheless, very strict in requiring clear proof of the adoption being openly declared, and recognized in such a manner as can leave no doubt of the adopting party's intention, that the child adopted should thereby succeed as an *heir* to the estate of the adopting parent. Thus, it has been held, though a child may have been reared in a family, and contracted marriage, and dwelt with his wife in the house of his patron, and cultivated his lands, yet such circumstances alone would not be construed into a regular adoption, unless it could be also shewn that by agreement with the natural parents of the child on its removal, or by subsequent declarations and acts of the adopting party, a clear intention was manifested by him to adopt the child as his own son, and to make him an heir to his estate. [No. 3569, D. C. *Colombo.*

Kandyan Law. Clear proof of adoption required to succeed as an heir.

June 2, (O.)

740.—*Lama Naide* v. *Camis.*

"The Court makes the person called the fourth defendant a defendant, which it had no right to do. He makes a statement, and so do other defendants, or persons called defendants, which are not evidence or oral pleadings, not being signed by them as directed by the rule. These, therefore, must all be treated as nullities, but the second and third defendants admit quite enough to warrant the judgment, which has been given to apply to them." [No. 8497, D. C. *Colombo.*

The Court has no right to make a person a defendant. Statements not evidence, unless they are signed.

June 14, (O.)

At Chambers.

741.—In the matter of a male child of *M. S. U. Lebbe Markar.*

"It appears by the Mahomedan Law, Hedaya B. 4, C. 13, that the maternal grandmother is en-

Mahomedan Law. The Ma-

ternal grand-mother is entitled to the care of the child.

titled to the *Hezamit*, that is to the care of this child, in preference to his father. The child, who was only born in December last, has, since the death of his mother, been in the custody of his grand mother, against whose care no imputation is made."

June 17, (O. C. S.)

742.—*Mattambegammegedere* v. *Malpittia-gedere.*

Admissions under the Ordinance of Prescription, must not be vague.

The judgment in this case was reversed, and the proceedings were remanded back to the District Court to take evidence on both sides, and proceed to judgment. "The only admission of the plaintiff is in these words, '*we offered him his money about ten years ago*', which does not amount to the full time required by the prescriptive Ordinance, and is in itself a vague expression, and occurring on an examination sixteen or seventeen months after the suit was instituted". [No. 1321, D. C. *Kandy.*

June 21, (O. C. S.)

743.—*Rajepakse* v. *Rajepakse.*

Probate when necessary.

A legacy, and appointment of executors, contained in a Will, held sufficient to render probate necessary, and to sustain the Will (*pro-tanto,*) although the remainder of it may be inva id, upon which the Court gives no opinion. [No. 51, D. C. *Amblangodde.*

June 23, (O. C. S.)

744.—*Gooneratne Unanse* v. *Batagedere Unanse.*

Temples held in Pooteyalika, may be granted to a layman.

Affirmed. " The plaintiff claims the temple as held in *angika* but it is satisfactorily proved that it is held in *Pooteyalika*; and there is also evidence that temples held in *Pooteyalika* may be granted to a layman, which is not rebutted by the plaintiff or intervenient". [No. 2746, D. C. *Colombo.*

745.—*Jansz* v. *Figera.*

"The Court is of opinion that the Ordinance No. 7 of 1834, sec. 2, does not require all sales, &c., of lands, or agreements to sell, &c., to be in writing, and therefore does not affect the point reserved.

Frauds and Perjuries. All sales and agreements need not be in writing: Reg. 1 of 1806 does not require agreements to transfer land to be in writing.

"The Court is further of opinion that No. 2 of 1817 being repealed by No. 7 of 1823, but without saving thereby of previous Regulations, the Regulation No. 1 of 1806, which had been repealed by that of No. 2 of 1817, thereby revives, and it is clear that this Regulation does not require agreements to transfer lands to be in writing, and consequently the allotment in question is not void". [No. 17322, D. C. *Colombo.*

746.—*Kaloo Menika* v. *Pina.*

The only question, in this case, was whether the witnesses of the plaintiff having proved a title by prescription in the defendants, the latter were entitled to a *judgment* in their favour with costs.

A Plaintiff proving prescriptive title in the defendant, entitles the defendant to judgment.

Judgment. The defendants by their answer do not plead prescription, but after pleading other matters, aver that the whole of the plaintiff's claim is false. The plaintiff commences his libel, "plaintiff claims one-half of the field &c." The evidence adduced by himself shewed that he could not have any claim for these lands which the law could recognise, inasmuch as he proved undisturbed and uninterrupted possession by the defendants for more than ten years; and by the Ordinance No. 8 of 1834, such proof entitles the defendants to a decree in their favour with costs. [No. 3603, D. C. *Seven Korles.*

June 24, (O.)

747.—*Mahammado Lebbe* v. *Bawa Lebbe.*

The District Judge has no right to interfere with the filing of documents, as such filing does not make them evidence. [No. 10086, D. C. *Colombo.*

A D. J. has no right to interfere with the filing of documents.

(O. C. S)

748.—*Mootoo Menika*, on behalf of her children, v. *Tikery Menika.*

Custom of Saffragam. Daughters of the half blood do not forfeit, by any deega marriage, their right to inherit to a moiety of their parent's estate in favor of their brothers or sisters of the half blood.

Judgment. Decree modified by its being decreed that the plaintiffs are entitled to recover one half of the lands in dispute, and that both parties do pay their own costs in this case. The late father of the second and third plaintiffs and first defendants having left issue by two marriages, his estate should be divided into two equal portions, and the defendant being the only child by one marriage, is entitled to a moiety of her parent's estate, and would not forfeit such right by her deega marriage in favour of her brothers or sisters of the half blood.

There appears to have existed a difference between the *Saffragam* and *Udderatte* customs on this last point, as by the Saffragam customs a deega daughter of the half blood would never forfeit by any deega marriage her right to inherit a share of her father's estate in favour of her brothers and sisters of the half blood; whereas the old Uderatte customs made a distinction in such cases as to the rights of the daughter when she had been married in deega by her father, and where she married in deega subsequent to his decease. Yet, this distinction never extended to the mother's estate; and even in respect to the father's estate it does not, from the cases cited at the bar, appear to have been adhered to or acknowledged latterly by the Kandyan Chiefs, (who have been examined in the Supreme Court as Assessors, and as witnesses to the customs:) the more liberal custom having generally prevailed, viz:— that the daughters of the half blood do not forfeit, by any deega marriage, their right to inherit their parents estate in favour of their brothers or sisters of the half blood. [No. 1333, D. C. *Kandy.*

749.—*Punchi Menika* v. *Tennekoongedere.*

Kandyan Law. The issue of

Where a proprietor leaves issue by two marriages, his property must be divided into two equal

portions, and the issue of each marriage is entitled to inherit a moiety. A daughter of the first marriage does not forfeit her right to a moiety of her parent's estate by her deega marriage, in favour of her brothers of the half blood, who are entitled only to the other moiety. [No. 3574, D. C. *Matelle*.

two marriages is entitled to inherit a moiety of their parents estate.

July 6, (C.)

750.—*Buddaharaksite* v. *David Appoo*.

Government Grant. Presumption. Onus of proof.

In this case the decree was set aside, and the proceedings were remanded back to the District Court to allow the plaintiff to give notice to the Government to intervene, and for the District Court to hear further evidence, and to give judgment *de novo*.

The plaintiff claimed under a Grant from Government, and the real question between the parties was, whether the land in dispute was the property of the Crown at the date of such grant, or whether it belonged to the defendants.

Judgment. From the evidence the land is of a description which would come within the provisions of the 6th clause of the Ordinance No. 12 of 1840, wherein it is enacted that all chena and other lands, cultivated at intervals of several years, shall be deemed to be forest or waste lands, and presumed to be the property of the Crown until the contrary be shewn. The defendants cannot, therefore, rest their claim to the land upon the weakness of the evidence of the witnesses called by the plaintiff, because the onus lies on the defendants to adduce sufficient proof to rebut the above legal presumption of the lands being the property of the Crown; the evidence hitherto adduced by the defendants is very unsatisfactory. [No. 33173, D. C. *Colombo*.

July 12, (O. C. S.)

751.—*Toussaint* v. *Martensz*.

Hon. *A. Buller*, Q. A., v. *Rachet*, administrator of the estate of *J. H. Mooyaart*.

Payment of claim in exe-

Judgment. On the 15th February 1842, the District Court made an order in the case No. 4,011

cution. Law as to preference and concurrence.

for the payment of the amount of deposit under the writ 2,225, to the estate of *Verwyk.* Mr. *Modder* opposed this application, both as Proctor for the plaintiffs, and also as Deputy Queen's Advocate. On the 17th February 1842, Mr. *Modder,* as Deputy Queen's Advocate, made an application in the case 10,939, that the amount deposited, being the proceeds sale of 3rd defendant's property, might be paid to the Crown in part satisfaction of the judgment of the 16th February in the Crown's favour, which was refused on the ground that the District Court had already made an order on the 15th February, for the payment in favor of *Verwyk's* Estate; but this order the Supreme Court has, on this appeal heard on Circuit, set aside, because there was another applicant, and the claims had not been investigated and the priority ascertained. The case now comes before this Court on the appeal by the Attorneys of *Vander Spaar,* (who are the real plaintiffs in both cases,) against the order of the 15th February, and this Court is of opinion that a sufficient claim was put in against the sum in deposit, because the same was still in *custodia legis,* and not paid over to the creditor who took out execution. The Dutch Law appears conclusive on this subject. Thus in Peter Peckius *on Arrest,* p. 464, § § 2, 3 and 4, it is stated, "This matter is treated here at large, and appears nearly to have created the distinction between judicial pledge, *id est, pignora prætoria,* which is granted without previous proceedings at law, for the securing of a thing in litigation; *de quibus num 2,* from which our common arrest and attachment does not differ much. nor from pledge, *hoc est, pignora judicialia,* seized by virtue of execution on judgments; (this distinction, however, does not determine the case by our daily practice, because it is a general rule amongst us that arrest gives no preference without any distinction, even in *pignora judicialia,*) and arrest in execution, which gives to no one a right, as long as the effectual execution does not follow it, that is to say, as the executed

property or the proceeds produced therefrom, have not been actually delivered over in the hands of the creditor; because as long as there is something remaining, it is understood that preference and concurrence take place, and that every one may always for that purpose interpose his claim, as the execution being made for every one each retains his right. For which purpose also the publications of sale by execution are made in order that every one may prefer his claim if he has any. See Instructions of the Court, art. 176 and 177. This had been adjudged in revision by the Supreme Court on the 27th February 1652, on a certain Petition presented by *Aelbrecht Erasmus Heerman* against the Superintendent of the dams and dykes of the great Dykes of Aelsmeer, plaintiff, in arrest in execution on the moveable goods of *Gerrit Tresveld*, sheriff of Aelsmeer, against the delivery of the proceeds of the goods sold, and the prayer for injunction granted against the payment of the proceeds in execution. In which case it has been distinctly adjudged that as the plaintiff has not opposed the sale or execution, which he approved as being well and rightly done, but only prosecuted his right to the proceeds produced of the goods sold, he was admissible as long as the same were not paid over. For which purpose in some towns are particular statutes that the sheriffs are bound not to pay over to the triumphant, the proceeds sale in execution which they receive, but to bring the same into the Court to be distributed there after inquiring into the matter. See Statutes of Leyden, art. 197 in fine. *Eo etiam spectare videtur decisio;* Anton. Fabri ad tit. Cod. *de execut. rei jud.* lib. 7. tit. 20, defin. 5; *ubi refert quod judicati actio non habeat privilegium taciti pignoris; atque ideo non aliter condemnati bona pignori capi possint quam si condemnato intra statutum tempus non satisfacienti, hoc ipsum judex statuat.*"

The Court further refers on this point to the following passage from Peter Vroman's Treatise

de Foro Competenti, B.1, c. 3, pp. 122 and 123. "At Utrecht, attachment by execution gives right of preference. Vide Consultations of Utrecht, vol ii. cons. 134. But with us this has not been adopted in practice. According to the common rule, arrest gives no priority or preference. Therefore with us, in regard to preference, there is no distinction made between arrests, which are granted without previous proceedings at law for securing a litigious cause, and arrests in execution. Because even in regard to the last, he that obtains execution first does not amongst us acquire any right over all others, as long as the property seized, or the proceeds produced therefrom, has not in fact been delivered over to him, up to which time every one is at liberty to interpose his claim, because until such time it is considered that preference and concurrence have place, and that the execution was made on behalf of all and every of the creditors, saving to each, however, his right; as has been adjudged on the 27th February 1652 by the Supreme Court in revision on the petition presented by *Augustus Erasmus Heerman* against the Inspectors of the dams and dykes of the great Dam of Aelsmeer, plaintiff in arrest in execution, and the prayer for injunction against the payment of the proceeds in execution granted."

The order of the 15th day of February 1842 must therefore be set aside, and the amount deposited be paid to all claimants according to their legal priorities. Each party to bear their own costs, excepting such costs as may have been caused by the new libel not having been filed in time which must be borne by plaintiffs. [No. 4011, D. C. *Jaffna* ; and No. 10939.

752.—*Silva* v. *Juan Naide.*

Triple costs.

The Supreme Court have not been able to find that the District Courts have any authority, by the Dutch Law, to award triple costs. [No. 8931, D. C. *Colombo.*

August 30, (C.)

753.—*Perera* v. *Neina Lebbe.*

The conviction and sentence in this case was reversed, the Court not having proceeded according to the 19th Rule of sect. II. of the Rules and Orders of the District Court for the prosecution and punishment of Contempts. [No. 9624, D. C. *Colombo.*

Proceedings in cases of Contempt.

Aug. 31, (C.)

754.—*Fernando* v. *Rodrigo.*

A Court has no power to cancel, obliterate or alter any private map or survey which a party may have had made of his land, merely on account of the respective boundaries of the portions which he holds separately and in common, not being correctly defined thereon; though a Court can reject any such survey in proof, or record its opinion upon the general evidence, shewing its incorrectness. [No. 9247, D. C. *Colombo.*

The Court cannot alter any private map owing to its incorrectness.

Nov. 15, (O.)

755.—*Odoma Lebbe* v. *Sinne Lebbe Markan.*

"Neither the Libel nor the Lease make any mention of the planter's share. When one leases land or claims it in a libel, he leases or claims the land and all that is on it. If the defendants claim, as they have done, something on this land, it is for them to make good their claim, if they be out of possession. Therefore, the order directing the plaintiffs to prove their title to the planting share must be set aside, and the plaintiffs must file a reply; thereby issue can be joined as to whose property the planter's share is, without the necessity of any fresh action." [No. 10228, D. C. *Colombo.*

Pleading in an action on a Lease.

Nov. 23, (O)

756.—*Sultan Sayboe* v. *Sinne Pulle Markar.*

On the 20th day of January 1843 judgment was given by default in plaintiff's favour, and appeal was entered in due time; but on the

Judgment by default. Motion to open

up judgment when rightly rejected.

25th a motion was made under the 38th Rule of Court, on behalf of the defendant, that the judgment should be set aside, and the defendant be allowed to put in his answer. The District Court, on the 1st July 1843, refused the application on the ground that it had not power to set aside its own final judgment.

On appeal the following judgment was pronounced:—

If it were necessary to the Supreme Court in this case to decide this point, it would reserve it for the consideration of the Judges collectively. But the Supreme Court considers that the application was rightly rejected, as the defendant in this case was not in a condition to take the benefit of the rule, inasmuch as he never could show that he was prevented from appearing in due time by accident or misfortune, or by not having received information of the proceedings, inasmuch as he did appear and was represented by his Proctor during the whole proceedings. There is nothing, so far as appears, to have prevented him, before his departure for the Coast, to have furnished his Proctor with full instructions, not only for answer, but for the conduct of the case until its determination; and he might have communicated with him in the course of a few days even whilst absent, and obtained time to take any particular step if required. If it was necessary to proceed to the Coast to obtain information to defend the suit, the defendant should before his departure have applied to the Court for time on the above mentioned ground. But he leaves the Island, and he leaves also his case to his Proctor without instructing him how to proceed in the very next stage of the case. Can he complain if the plaintiff, who instituted the suit in March 1842, presses for and obtains judgment in January 1843? He has no equity that this Court can discover, to induce it to reverse the order of the District Court of the 1st day of July 1843, which is therefore affirmed with costs. [No. 35663, D. C. *Colombo.*

757.—*Bawa Saiboe* v. *Saiboe Lebbe.*

There is no law of which the Supreme Court is aware, which compels the defendant to put in his answer before the plaintiff can be called on to give security for costs. As there is no entry in the diary relative to what took place on the defendants being allowed to sue *in forma pauperis*, the District Judge will certify to the Supreme Court whether the plaintiff was asked whether he had any opposition to make to the defendants being admitted to sue as a pauper under the 45th and 46th Rules of Court. [No. 9783, D. C. *Colombo.*

Security for costs. Plaintiff must be asked wethhe has any opposition to the defendants being admitted to sue as a pauper.

758.—*Silva* v. *Perera.*

Fernando, intervenient.

An intervenient who intervenes to justify the title of defendant, cannot be non-suited. [No. 8563, D. C. *Colombo.*

Intervenient cannot be non-suited.

Nov. 24, (O.)

759.—*Lebbe Markar* v. *Lebbe Markar.*

"No ground is laid for obtaining a Sequestration, a burthensome and expensive process which should not be granted unless under an imperative necessity." [No. 10324, D. C. *Colombo.*

When Sequestration ought to be granted.

760.—*Fernando* v. *Baba Hamy.*

If parties wish cases to be reserved for collective decision, the Supreme Court expects that the appellant will appear in support of his appeal. In the present case the Court was of opiniou that the only question of nicety was whether the receipts were receivable under the Stamp Act, and the Court was of opinion that they were admissible under the clause which exempts Bills, Notes, Receipts and Acquittances made or given to or by Government, or any of the public officers thereof. [No .8948, D. C. *Colombo.*

Admissibility of unstamped Receipts.

761.—*Fernando* v. *Fernando.*

Non-payment of costs in a previous case is no bar to another case against the intervenient.

"The Supreme Court does not see why the plaintiff should not be allowed to go on with the case against the intervenients, because he has not paid defendants' costs in former cases." [No. 10577, D. C. *Colombo.*

Nov. 28, (O.)

762.—*Meapulle* v. *Meera Lebbe.*

Casim Lebbe, intervenients.

Clear title to intervene must appear on the petition

If parties are to be allowed to intervene it must only be on shewing a clear title so to do by their petition of intervention. [No. 8049, D. C. *Colombo.*

February 13, 1844, (C.)

763.—*Mendis* v. *Silva.*

Requirements of Security in Appeal.

In this case the appeal was rejected, the parties having omitted to give security within due time, and the proceedings not being accompanied with any certificate of the Secretary, or report that it had been proved to the satisfaction of the District Court that such omission of the appellant was not imputable to negligence or delay on his part. [No. 3524, D. C. *Amblangodde.*

Feb. 14, (C.)

764.—*Cowjee Eduljee* v. *Ismail Lebbe Markar.*

Security in Appeal, on Interlocutory Orders.

The appeal in this case was allowed without security, under the exception in favor of interlocutory orders contained in the 3rd clause of section vii. of the Rules of Court.

"Interlocutory order" and "Interlocutory decrees" synonymous.

"The question appears settled by the Dutch Law authorities quoted, that provisional sentences and decrees not being definitive, though they have sometimes the force of definitive sentences, are still typically (*oneigentlyk*) comprehended under, or come within, the denomination of interlocutory sentences; and the Court does not consider itself justified in putting a limited construction on the general exception in favor of all interlocutory orders in the above rule, so as to exclude any sentences that are of an interlocutory class or nature. As an instance that the Court has hitherto considered the terms "interlocutory orders" and "interlocutory decrees," as often used synonymously, being both comprehended under the general Latin term of *sententia interlocutoria*, and the Dutch word "*interloqueeren*," the Court may here refer to the practice on judgments overruling pleas or demurrers, and condemning the defendant to answer, which are called "interlocutory decrees," (Van Leeuwen p. 628.) They affect the principal question, and have the force of a definitive sentence on the point of defence raised in the plea or demurer. Yet appeals from such interlocutory orders or sentences have always been allowed without security.

"On behalf of the respondent the Court has had strongly pressed upon its consideration that execution may issue under a provisional sentence of Namptissement, wherein it materially differs from an iuterlocutory order which ought to be enforced by attachment for contempt; but the Court views the process to enforce the sentence of Namptissement as only inlerlocutory: like a sequestration, it deposits the sum which is in dispute between the parties provisionally, with the plaintiff, upon his giving sufficient security, instead of its remaining in the hands of the defendant, pending, and subject to, the final issue of the cause." [No. 37269, D. C. *Colombo.*

Process to enforce sentence of Naptissement is interlocutory.

April 19, (S.)

765.—*Ahamado Lebbe* v. *Sultan Marikar.*

"Days" how reckon'd under Rules and Orders.

In all cases in which by the Rules and Practice of the Courts, any act is required to be done within a particular number of days, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday or public holiday, in which case the time shall be reckoned exclusively of that day also. [No. 4762, D. C. *Colombo.*

May 4, (S.)

766.—*Francina Dias* v. *David Perera.*

Whether and when a Suppletory Oath is receivable.

In this case the interlocutory order was set aside subject to the opinion of the Judges collectively on the following points:

1st. Whether the oath, which the plaintiff moves to be allowed to take, is of the nature of suppletory oath, and to be allowed only where a semiplenary proof already exists or is essential to the maintenance of the action;

2nd. Whether it now subsists by Law; and

3rd. Whether it must be allowed in this action. [No. 35800, D. C. *Colombo.*

767.—*Ackland, Boyd, & Co.* v. *Kasy Lebbe Markar.*

Application for a Mandamus on appointment of an Acting District Judge.

Robert Langslow, Esquire, files an affidavit verified on oath before the District Judge of Colombo No. 1, South, stating "that more than "3 years ago he was by virtue and in pursuance "of Her Majesty's Royal Warrant under the Sign "Manual, constituted and appointed District "Judge of the District Court of Colombo No. 1, "South, within this Island. That he was never "removed from the said office of District Judge, "otherwise than by or so far as a certain letter "addressed to him the said *Robert Langslow*, "and signed by the Secretary to the Government "of the said Island, and its accompanying docu- "ment, can be construed or considered to effect "such removal. The said letter is dated the 11th "December 1843, and is in the following terms:—

'Sir,

'Your exculpatory statement dated the 20th 'ultimo, and your letters of the 8th September and '7th December last, having been laid before the 'Governor and Executive Council, I am directed 'to inform you that the same have been carefully 'considered, and that His Excellency and the 'Executive Council are of opinion that no ground 'whatever has been shewn why you should not 'be suspended from office on the charges already 'communicated to you; and I am now to transmit 'to you an order made by the Governor and Ex- 'ecutive Council suspending you from the Office 'of District Judge of the District Court of Co- 'lombo No. 1, South, and you will be pleased to 'hand over that Office forthwith to Mr. *Temple*, 'who has been appointed to act as District Judge 'in your room.

'I have, &c.,

'Signed *P. Anstruther*, Col. Secy.

'The accompanying document in the said letter 'is as follows:—

'Extract from the Minutes of the Executive 'Council held at the Council Room at Colombo 'on Monday the 11th day of December 1843.

'It is ordered that *Robert Langslow*, Esquire, be 'suspended from the Office of District Judge of 'Colombo, No. 1, South.

'A true Extract.

Signed, *William Charles Gibson*,
Clerk to the Council.

And further verifying—" that he did on the " 11th day of December, reside within the said " District, and has continued to do so ever since,— " and that he has during all that period been ready " and willing at all times to perform the functions " and execute all the duties of the said District " Judgeship. And the said deponant has been in- " formed and verily believed that the gentleman " now performing the duties of Judge of the said " District Court, acts as such by no other autho- " rity than the appointment of the Governor of " the said Island."

The said affidavit is read and filed.

The said Mr. *Langslow* thereupon moves for a Mandate in the nature of a Writ of Prohibition to issue to the South District Court of Colombo, on account of the incompetency of the said Court, arising from the illegal and defective appointment of the Acting Judge.

It is ordered that the said motion be reserved for collective decision and direction generally.*
[No. 40797, D. C. *Colombo*.

May 27, (O. C. S.)

768.—*Rajepakse* v. *de Silva*.

Security Bond cannot be signed by a Proctor, unless authorised thereto.

"The proceedings in this case having been read, all the Judges agree that the Security Bond is bad. They are of opinion that the proxy does not authorize the Proctor to whom it is given, to sign the *Security Bond in Appeal*. The *Chief Justice*, and *Senior Puisne Justice*, (the *second Puisne Justice* dissenting,) are of opinion, from the analogy of the practice in the House of Lords and Privy Council, and from the address and nature of the Petition in Appeal, that, strictly speaking, it is business which ought to be done

* Motion subsequently refused.

by a Proctor of the Supreme Court. But the whole Court is of opinion that in the present state of the out-station Courts as regards Proctors, it is not practicable to confine this business to Proctors of the Supreme Court, and that it is expedient to construe the late Rules of Court (12th December 1843) on the subject, according to the plain and literal meaning of the words, namely, that *Appeal Petitions* may be prepared and signed by any Proctor whatever." [No. 3949, D. C. *Amblangodde.*

Costs for drawing pleadings allowed only to Advocates and Proctors.

D. C. Proctors may sign appeals.

769.—*Siman* v. *Swaris.*

Appeal Petitions may be signed by any Proctor.

The Supreme Court, in this case, was of opinion that the Petition of Appeal was duly signed, although the Proctor signing the same was not a Proctor of the Supreme Court. (Vide Judgment in previous case, No. 3949, D. C. *Amblangodde.*) [No. 4424, D. C. *Amblangodde.*

770.—*Goddegame Oonanse* v. *Appoewa:*

Taxation of costs.

The Application was ordered to be referred to the District Judge for his decision under Rule 41 of sec. 1, as the party dissatisfied with the taxation ought, in the first instance, to have submitted the matter in dispute to him. The Supreme Court was, however, of opinion that no costs for drawing pleadings could be allowed to any other than to Advocates and Proctors. [No. 10365, D. C. *Matura.*

June 1, (O. C. S.)
771.—*Livera* v. *Fernando.*

Prescription must be pleaded.

The Supreme Court was of opinion that the Defendant could not take advantage of the Ordinance of Prescription without specially pleading the same, and that by his omission to do so, the plaintiff was liable to be surprised. See Saunders, Rep. vol. 1, p. 283; and vol. 2, p. 63; and *Chappel* v. *Durham*, 1. C & J. [No. 4409, D. C. *Amblangodde.*

July 12, (C.)

772.—*Fernando* v. *Fernando.*

Appeal in a Criminal case rejected, where no grounds were stated.

The appeal, in this case, was rejected, no ground of appeal being stated as required by the 1st sect: of the Rules entitled, " On Appeals from Sentences of the District Courts in Criminal Matters". [No. 9076, D. C. *Colombo.*

773.—*Ibrahim Lebbe* v. *Saibo Lebbe.*

Admission of a debt on account stated.

Any admission of a balance, or acknowledgment made by one party to another that a sum of money is due to the latter, is sufficient *primâ facie* evidence to entitle the plaintiff to recover that sum on an account stated; and it is not necessary to give evidence of the several items constituting the account. If the account be stated also verbally, the witnesses present should be summoned to prove the same; but if in writing, then the same should be produced, and the defendant's signature proved. [No. 9794, D. C. *Colombo.*

774.—*Pitche Tamby* v. *Mera Sekady.*

Burthen of proof, on plea of payment.

"The defendant pleaded payment, and the *onus* lies on him to prove the same. His statements upon his examination also are so contradictory as to throw very great suspicion about the truth of his case." [No. 9715, D. C. *Colombo.*

775.—*Fernando* v. *Fernando.*

Burthen of Proof under Fiscal's Ord. No. 1 of 1839.

"By the Fiscal's Ordinance No. 1 of 1839, sect. 15, it is enacted—" that in all cases of disputed "property the person in possession, or if the "property be in the possession of the debtor and "any other person or persons, then the debtor, "shall be considered *primâ facie* the proprieter "thereof until the contrary be shewn." In this case, if the 1st defendant had called any evidence to prove a joint possession, as alleged by him, it would have thrown the plaintiffs on the proof of their title; and in default of 1st defendant to adduce such proof, the plaintiffs ought to have called

some evidence as to their being in possession, as it is not admitted by 1st defendant." [No. 9173 D. C. *Colombo.*

July 23, (C.)

776.—*Unga* v. *Sirimalle.*

If the plaintiffs had, before Replication, objected to the sufficiency of the Answer, the Court would have held that the plaintiffs were entitled to specific answers from the defendant to all the material facts alleged by the plaintiffs in their libel, as it might tend to shorten the plaintiffs proof; but the plaintiffs having replied, and the parties being sufficiently at issue on the pleadings, this Court cannot concur in the order for the defendant to file an amended Answer. The proper course is to examine the defendant, if his admissions are on any point required in aid of the plaintiffs evidence or case. [No. 15928, D. C. *Kandy.*

Objections to the sufficiency of the Answer must be taken before Replication.

777.—*Pitche Kutty Chetty* v. *Pariari Kuttalan.*

Where a contract is made by one of several partners, the action may be maintained either in the name of the person with whom the contract was actually made, or in the name of all the parties really interested. It is clear that the defendant in this case dealt only with the plaintiff, who was the ostensible party, and that the defendant never knew that the plaintiff had a partner. *Leveck* v. *Shaftoe*, 2 Esp. 468; *Mawman* v. *Gillet*, 2 Taunt. 324; *Skinner* v. *Stocks*, 4, B. & A. 437; *Cothay* v. *Fenpel*, B. & C. 671.

Action upon a Contract with one of several partners.

The appeal ought not to have been made from the interlocutory order or decision of the District Judge, overruling an objection taken during the hearing of the suit; but the appeal ought to have been brought on the same grounds against the final decree. [No. 15820, D. C. *Kandy.*

Appeal not allowed from an interlocutory order during trial.

July 25, (C.)

778.—*Salman Appoo* v. *Juan.*

Proof of actual possession is sufficient to maintain an action for trespass.

Proof of actual possession, whether legal or not, is sufficient to maintain an action of trespass against a mere wrong-doer, or a person who cannot make out a title *primâ facie* entitling him to the possession. [No. 10774, D. C. *Colombo.*

779.—*Kuda Appoo* v. *Baba Appoo.*

An Indictment for stealing a "Bullock," supported by proof of stealing a "Bull," but conviction quashed for want of proof of ownership as laid.

"The word "ox," plural "oxen" (species *bos,*) is defined in Johnson's Walker's, and Sheridan's Dictionary to be "the general name for black cattle;—a castrated Bull." And the name of ox or bullock is commonly used in this Colony as the general name of horned cattle distinguished from buffaloes."

"Upon an indictment for stealing a bullock, it was objected in arrest of judgment that this description applied only to "a young bull," but that the evidence proved that the animal stolen was a *bull.* On the point being reserved for the Collective Court, the Judges were of opinion that the indictment was sufficiently proved as to the description of the animal stolen; but the judgment was arrested on another objection, viz: that the animal was proved not to belong to the person laid in the indictment as the owner, nor to be in his possession, but to belong to another individual." [No. 11202, D. C. *Colombo.*

780.—*Dingiry Ettena* v. *Punchy Ettena.*

Kandyan Law. Issue of first marriage entitled to inherit one-half of Father's lands, and the issue of second marriage the other half, subject to the widow's right.

The Supreme Court fully concurs with the assessors that, by the Kandyan Laws, the plaintiff, as the only child of *Dingihamy* by his first marriage, is entitled to inherit one-half of his lands, and the children of his second marriage are entitled to inherit the other half thereof, subject to his widow's claim to maintenance from such latter half; even if *Dingihamy* is to be considered the sole proprietor from prescriptive right to his brother's share, by an uninterrupted

adverse possession thereof, since his death, which plaintiff admits to have occurred fifteen years ago. [No. 4375, D. C. *Colombo.*

781.—*Karangode Unanse* v. *Kirry Appoo.*

In practice, both the District Courts of Colombo are very indulgent in allowing answers to be filed after time, where the delay has been very short, and the party has been in default only from ignorance. [No. 4855, D. C. *Colombo.*

Answer received after default, where delay has been short, and the deft. has been in ignorance.

782.—*Lebbe Markar* v. *Don Abraham.*

"All the pleadings in this case on both sides are very discreditable, and this Court would disallow the costs thereof, excepting that, as it is a first class case, only ten per cent. is payable in costs.

Ord. No. 12 of 1840, is applicable only to claims against the Crown.

"The provision in the Ordinance referred to is applicable only to claims against the Crown, the words "such person" clearly referring to "any private person *claiming* the same against the Crown"; and in such cases also, if proof of a Sannas or Grant cannot be adduced, the claimant can still support his title by proof of such customary taxes, dues, or services having been rendered within 20 years for the lands, as have been rendered within such period for similar lands being the property of private proprietors in the same district." [No. 4678, D. C. *Colombo.*

July 30, (C.)
783.—*Silva* v. *Silva.*

"The order ought to have been made in open Court pursuant to the 30th clause of the Charter, as it has the effect of postponing the final decision of the case; and the affidavits filed are too general and not sufficiently specific in their denial to set aside all the proceedings on the plaintiff's part, considering that there are affidavits of service of the Summons on the defendants, and two notices of judgment, and that the Fiscal also must have seized the property of the defendants prior to publishing the sale thereof. Strict

Orders must be made in open Court. Affidavit to open up judgment and file Answer must be specific.

investigation should be made into all these facts; and the Court be satisfied that it has been imposed upon therein, before an order could be made to admit the defence in this late stage of the suit." [No 9752, D. C. *Galle.*

784.—*Ludovici* v. *Samoe Lebbe.*

Sequestration. Orders must be made in open Court.

The interlocutory order in this case was modified by the sequestration being limited to the issues, rents, and profits of the land, according to the 19th Rule, sect: 1 of the Orders of Court.

"The proper remedy was a motion for an injunction for trespass and destruction of the property. 6 Ves. 147; 7 Ves. 138; & 17 Ves. 110. This Court, moreover, considers that Orders of this special nature should be made in open Court, and upon short previous notice, (if two days are objectionably long,) of the application being given to the opposite party, unless the emergency of the case will not allow of that course being safely adopted, or there be good reason to apprehend that such course might in the particular case tend to defeat the ends of justice." [No. 10577, D. C. *Galle.*

785.—*Sinneamado* v. *Punche Ettena.*

Objection to an order must be made in time.

"There is no doubt that there are not sufficient grounds stated on the record for the order of the 21st November being made under the 38th Rule, Sect: 1; but as plaintiff never objected thereto by appeal, and has since filed Replication to the Answer, Lists of Witnesses, and consented to proceed on to trial, it is too late now to object to the Order." [No. 4187, D. C. *Matelle.*

786.—*William Wise* v. *Ibrahim Sahib.*

Demurrers not allowed without shewing specially the nature of the objection.

Since the new Rules of the 5th July 1842, it has not been the practice of the District Court of Colombo to allow general demurrers, excepting to the sufficiency of the Libel in general terms, without shewing specially the nature of

the objection. Although the practice of English Pleading is to allow demurrers in such general terms, yet, as the party demurring must enter the exceptions intended to be insisted on in argument in the margin of the demurrer books he delivers to the Judges, (Arch. Pr. vol. 2, p. 9.), there really exists little difference therein from the shorter course prescribed by the new Rules. [No. 16016 D. C. *Kandy*.

August 1, (C.)

787.—*Kirri Banda* v. *Mohottale*.

"This Court considers that the father of the Plaintiff and the 1st defendant were formerly joint possessors of the Estate, but as the 1st defendant has lost his moiety under the decree in the Case No. 7117 in favour of the late 2nd defendant, under whom intervenient claims, this Court could only set aside that decree upon the ground of collusion and fraud between the parties, and would therefore not set it aside in favour of the 1st defendant, as it is a rule that he who seeks for equity must come into Court with clean hands." [No. 2618, D. C. *Colombo*.

The S. C. can only set aside a decree, on the ground of collusion and fraud.

788.—*Alwis* v. *Alwis*.

In this case the proceedings were remanded back to the District Court for the Security Bond to be signed by the appellant, it having been decided by the Collective Court that the proxy should authorize the Proctor to whom it is given to sign the Security Bond in appeal. [No. 11011. D. C. *Colombo*.

Proctor cannot sign Security Bond, without authority.

Aug. 6. (C.)

789.—*Selappa Chetty* v. *Narayan Chetty*. *Sattappa Chetty*, Claimant.

The interlocutory order in this case was affirmed, subject to the opinion of the Collective Court as to whether the District Court of Galle, or the District Court of Colombo, should have jurisdiction in the matter in question.

Claims in execution,—where and how they must be disposed of.

The following "memorandum" was subsequently given in by the *Senior Puisne Justice*:—

The Senior Puisne Justice finds the practice on the point reserved in this case to be very unsettled. The Fiscal of Colombo states that claims upon all property seized in Colombo have, during his holding office, been decided in the District Court of Colombo. SIR C. MARSHALL in his printed notes, p. 258, refers to a case where land had been seized at Putlam under a Writ of Execution issued from the District Court of Colombo, and the Judges were of opinion that the claims should be decided at Putlam; but it would appear that the claims were ultimately heard in the District Court of Colombo upon the parties consenting to their witnesses at Putlam being examined on interrogatories. As consent of parties clearly cannot give jurisdiction, it must be presumed the Judges thought that the District Court of Colombo had jurisdiction in the matter, and the application must have been made for the transfer of the cause under the 36th clause of the Charter. The only other case the Senior Puisne Justice can find upon inquiry from the Registrar, is one wherein the Writ of Execution issued from Jaffna, and the property was seized in Colombo, and the claims were tried in the District Court of Colombo. In Van Leeuwen, p. 655, it is said, if the opposition against execution concern the *manner of carrying* the execution into effect, the Judge who causes the same to be effected, may decide thereon; but if the opposition concerns *the matter* itself, then it ought to be referred to the Judge who gave judgment. As far as concerns the Charter, the plaintiff's right to the property accrues within the jurisdiction of the District Court of Galle which issues the Writ in his favour, and it is equally hard upon him to support his title to the property before the District Court of Colombo, as it would be for the claimant to prove his right in the District Court of Galle. [No. 10202, D. C. *Galle*.

790.—*Meera Lebbe Markar* v. *Alvoe Lebbe Markar.*

A Cadotam does not require a stamp under No. 2 of 1822.

The Court considered that the *Cadotam* filed by the plaintiff in this case, bearing date the 1st July 1822, did not require a stamp under the Regulation No. 2 of 1822, as it was not a Conveyance or a Deed purporting to convey a title to land, but only an agreement for the future conveyance thereof. On reference to the subsequent stamp Laws No. 4 of 1827, clauses 5 and 9, and No. 6 of 1836, clauses 2 and 5, this distinction is more obvious, the clauses of the old Regulation relative to deeds purporting to convey a title to land being still retained in their original form, and additional clauses introduced to supply the omission therein respecting contracts and agreements. [No. 6850, D. C. *Colombo.*

791.—*Don Daniel* v. *Sultan Marikar.*

Ord. No. 8 of 1834, cl. 2. one co-heir, joint tenant, or tenant in common may prescribe against another, from the tenure of their Estates alone.

There are precedents holding that the possession of joint-tenant, coparcener, or tenant in common, is not an adverse possession ; but those decisioos are unfortunately founded wholly on the general law, (*Fairclaim* v. *Shackleton*, 5 Burr. 2604, and Roscoe, *Civ. Evid.* p. 329,) independent of the express provisions of the Ordinance. But the Ordinance of Prescription, No. 8 of 1834, has not simply declared that a possession of ten years adverse to or independent of that of the claimant shall give a prescriptive title, leaving it to the Court to decide what is in Law an adverse possession, but in the parenthesis in the 2nd clause of the Ordinance it is also declared what shall be considered such an adverse possession under that Ordinance. And upon all recent cases this Court has uniformly held that, under that parenthesis, there can be no exception drawn in favor of the possession of one co-heir, joint-tenant, or tenant in common not being adverse to the other from the tenure of their estates alone: and looking to the evil arising from the extr me sub-division of land in this Colony under the existing law of

succession, it may be reasonably presumed that the Legislature intended to annul all distinctions in Law between the possession of such persons and others. [No. 6587, D. C. *Colombo*.

August 10, (C.)

792.—*Yahapatte* v. *Horetàlle*.

Proctors allowed to sign Petitions of Appeal to prevent vexatious appeals.

One principal object of the Supreme Court in requiring, by the new Rules, that all Petitions in writing should be drawn and signed by Proctors, was, that it hoped, for the respectability of the profession, the Proctors would not lend their aid to parties in instituting vexatious and frivolous appeals. [No. 4401, D. C. *Colombo*.

793.— In re *Assen Packeren*.

Sundays and holidays excluded in computing time.

It is the practice of the Supreme Court, in computing time allowed under any Rule or order of the Court, to exclude Sundays and Public Holidays. [No. 17590, D. C. *Colombo*.

794.—In re *Louis Fernando, and Louisa Fonseka*.

Appeal must be drawn and signed by an Advocate or Proctor; or if drawn by the party must be attested by the Secretary.

The appeal in this case was rejected, it not being drawn out conformably to the new Rules of the 12th December 1843, which requires all Petitions of Appeal to be drawn and signed by some Advocate and Proctor, or, if taken down in writing from the mouth of the party by the Secretary, to be signed by the party and *attested by the Secretary*. [No. —— D. C. *Colombo*.

August 17, (C.)

795.—*Lokoo Banda* v. *Seremalralle*.

Witnesses to a deed cannot be examined respecting it, unless the writing is put

Where a Notary and two attesting witnesses to a deed were examined, without putting the document to their hands for them to identify, *held* that the District Court had committed an error. "A witness cannot properly be asked "on cross-examination whether he has written

"such a thing; the proper course is to put the "writing into his hands, and ask him whether "it is his writing." *Queen's case*, 2 B. & B. 293. As to the power of the Court to recal the witnesses, the District Court under the 28th rule, sect. 1, and sect. viii. of the rules of the 5th July 1842, has full power to call for any further evidence during the trial it may think necessary. and also to suspend its decision for it; and even in a criminal case, where the prosecutor's counsel closed his case, and the counsel for the defendant had taken an objection to the evidence, the Judge may make any further enquiries of the witnesses he thinks fit, in order to answer the objection. *Remnant's case* R. & R. 136. [No. 4138. D. C. *Matelle*.

into their hands.

Powers of D. C. to examine witnesses.

August 20, (C.)

796.—*Sapalhamy* v. *Kirry Ettena*.

"The grants filed appear to this Court to be Kandyan Deeds of Gift, which, excepting those made to Priests whether conditional or unconditional, are (like Wills) always revokable by the donor in his life time, and are often made in contemplation of death; but such grants differ essentially from Last Wills or Testaments in respect to their transferring an immediate title or interest to the donee in the property thereby granted: whereas a Will does not take effect until the death of the Testator. Until proof on both sides has been gone into as to the execution of these Grants, and it be shewn whether they were delivered or not to the donee, and whether the donees were put into the immediate possession of the land granted thereby, this Court cannot, in the present stage of the suit, give any definite opinion as to what is the legal effect of these deeds." [No. 4271, D. C. *Matella*.

Kandyan Deeds of Gift are revocable.

August 27, (C.)

797.— *Silva* v. *Perera*.

In this case the decree of the Court below was affirmed as to the rejection of the plaintiffs

Execution cannot issue

against the heirs of deceased parties, without a revival of the judgment

application to issue execution against the heir of the deceased 1st defendant, and the widow of the deceased 2nd defendant, the Court being of opinion that a Libel, in the nature of a Bill of Revivor, should be filed against the representatives of both the deceased defendants.—[No. 39527, D. C. *Colombo.*

798.—In re *Anna Helena Huybertsz*, a lunatic.

The S. C. has no original jurisdiction in respect of Lunatics.

In this case the order of the Court below was reversed, and the proceedings were remanded back to the District Court to make order in the matter, as the whole original jurisdiction over lunatics and their Estates was transferred, by the 26th clause of the Charter, to the District Court, and the Supreme Court cannot make an order, except upon appeal, for the management of any part of the lunatic's estate.* [No. 40952, D. C. *Colombo.*

September 24, (O.)

799.—*Simon Mathes* v. *Alwis.*

A Plaintiff cannot convert a libel claiming rent on a Lease into a claim for land.

Where by the libel the right of property to any immoveable property was *not* in dispute, *held*, that the rule of 23rd June 1843 did not apply, and it would destroy all regularity in pleading to allow a plaintiff to convert a libel claiming rent by virtue of a lease, into a claim for the property of land. [No. 4395, D. C. *Amblangodde.*

* The above order was, however subject to the Collective opinion of the Judges, which was reserved thereon; as the practice appeared to be unsettled in respect to the power of the District Court to make order for the payment of money of lunatics and others, which was vested in the Loan Board. Subsequently, at a Collective sitting of the Court, the following order was made; "That the order of the Court be affirmed. The Supreme Court is of opinion that the motion for a Rule on the Registrar of this Court has been properly refused. If the guardian will apply to the Loan Board for the sum in question, the Registrar's sanction to its disbursement will be directed to be given."

October 7, (S.)

800.—*Mohottale* v. *Kettanghamy.*

This was an action brought to recover the value of services and duties alleged to be due to the plaintiff from the defendants, in respect of lands held by the latter. In such an action the precise nature and extent of the duties and services claimed was thought necessary to be established, and their continued payment and performance. [No. 3361, D. C. *Dolombo.*

In an action for services due, the precise nature of the service must be specified.

Oct. 22, (O.)

801 —*Sinnepulle* v. *Supermanien.*

The proceedings did not state how the plea was brought for the opinion of the District Court, but the Petition of Appeal stated that the defendant moved that the Libel be dismissed by reason of the plea. *Held,* that if such motion was made it was irregular. " The proper way of proceeding was for the plaintiff to have filed a pleading irrespective of the plea, and thereupon the Court would have been called on to decide whatever might have been thereby put in issue. In the present case both parties seem to have acquiesced in the irregularity, and as the Supreme Court agree with the Court below that the action is not founded on Bill &c., the plea is not maintainable, and the interlocutory order is affirmed." [No. 9402, D. C. *Batticaloa.*

It is irregular for a deft to move that a Libel be dismissed by reason of a plea filed by him.

November 12, (O.)

802.—*Ispooneyna* v. *Andel Cader.*

The Supreme Court will only look at the report of the Proctor, and not into the merits of the case. [No. 12140, D. C. *Jaffna.*

Proctor's Report .

803.—*Sinnetamby* v. *Sinnetamby.*

Judgment.] The proceedings in this case are by no means in conformity with the Rules of Court.

1st. As to the entry, "plaintiff present, defendant absent." It was of no consequence whether plaintiff was present or not on the day on which defendants should have appeared, that is,

Presence of Parties when required, when not.

should have entered appearance, for their personal presence is not necessary.

2nd. It is mentioned, " plaintiff is absent." There was no occasion for his presence. It is there stated that 2nd defendant moves to answer, and a day is given him so to do. Why should such a motion be made and a day given when the rules fix the day?

3rd. The plaintiff moves for judgment for default of answer, and the 19th October is fixed as the day for giving judgment by default. It does not appear whether the parties in default are served with a notice thereof as required by the 7th rule of 5th July 1842, and instead of regularly proceeding on the 19th according to the rules, certain anamalous applications are made on the 10th, for which the rules give no sanction: for the time for answering having expired, it was no longer competent to move the Court to file answar, nor could an answer be filed unless (on the 19th when judgment was passed) the defendants were allowed to purge their detault under the said 7th rule.

4th. Then certain days are given to a Medical man to appear, &c. instead of the whole matter being settled on the 19th. However, the application was rightly rejected, and therefore the order of the District Court of Jaffna is affirmed.

The attention of the District Court is called to there being two defendants in this case, and the provision that is made therefor in the rules of 17th June 1844; and particular attention is requested to the beginning of the 4th clause of the same rules as judgment should not follow as mere matter of course on default. [No. 14767, D. C. *Jaffna.*

804.—*Coope Tamby* v. *Miera Natchia.*

Administration. The S. C. will not interfere with the appointment of administrator

Administration given jointly to parties between whom there exist bad feeling, cannot be advantageous to the Estate. This case was remanded to the District Court to make choice of one or other of the applicants, giving preference to the widow, unless good reason exists why the

brother should be preferred. The Supreme Court will be very slow to interfere with the appointment when made, as the District Court must be the best judge of the matter. [No. 12412, D. C. *Chilaw and Putlam.*

when once made.

Nov. 19, (C.)

805.— *Somenaden* v. *Conamale.*

Detention by a party of goods delivered to him by a deceased, is not a good ground for making him a co-deft. in an action against the Executors.

The Order of the Court below was affirmed in respect of the 1st and 2nd defendants, as they appeared to be executors *de son tort* by their intrusion and interference in assuming charge of the effects of the deceased ; and the plaintiff was directed to be at liberty to amend his libel by omitting his claim against the 3rd defendant, as the detention of the part of the effects delivered to him by the deceased, with the concurrence of the two first defendants, could not be a good ground for making him a co-defendant in this action : otherwise any number of persons withholding effects of the deceased in like manner under different claims, could be made parties to this suit, and the Court be thereby perplexed with trying several distinct issues in one action. A separate action should be instituted against the 3rd defendant, by some person entitled to sue as the legal representative of the deceased.—[No. 15830, D. C. *Trincomalie.*

Nov. 26, (C.)

806.—*Punchy Appoo* v. *Lama Ettena.*

Practice in case of an amended Libel.

The practice in the District Court of Colombo upon a plaintiff amending his libel is to take out a fresh Summons, and the defendant is entitled to eight days time to answer after entering appearance. The plaintiff cannot otherwise proceed for default of answer under the 7th section of the rules of the 5th July 1842, as the demurrer was filed instead of answering, under the 5th section, and was allowed. [No. 12219, D. C. *Chilaw and Putlam.*

November 28, (O.)

807.—*Morookowa* v. *Sindo.*

Admission of one deft. will not bind another.

"It may be very questionable whether the admission of the 2nd defendant, that the plaintiff has been in possession for fifteen years, and that the lands are service parveny, binds the 1st defendant. The case is remanded to give the plaintiff an opportunity of pleading prescription, and that the lands are service parveny." [No. 9576, D. C. *Colombo*.

November 29, (O.)

808.—*Nonchy Hamy* v. *Punchy Appoohamy.*

Practice in case where a Judge and the Assessors disagree.

Where after hearing plaintiff's evidence only, the assessors were of one opinion and the Judge of another, the Supreme Court set aside the judgment, and remanded the case, with leave to both parties to adduce such evidence as they may be advised, as it did not appear a satisfactory mode of proceeding to dismiss the case without hearing the defendant's witnesses, which might bring the Court to an unanimous opinion. [No. 10184, D. C. *Colombo.*

809.—*Wawa Saibo* v. *Bawa Saibo.*

Qu? whether the Government has a right to appoint Mahomedan Priests

This case was set aside, and the defendant was absolved from the instance on the ground that no appointment, by the Government, was proved by plaintiff, empowering him to be the only priest in Negombo by whom marriages can be celebrated, even admitting that the Government had such right of appointment; neither was it proved that the defendant was a priest, in which case, it was presumed, that he could not celebrate a marriage.* [No. 7659, D. C. *Colombo.*

December 2, (O.)

810.—*Baba Appoo* v. *David Alwis.*

The Court will not interfere when the parties are

If parties are content with the pleadings of their adversaries, it is not in general expedient for the District Court to interfere.

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* See Morgan's Digest, p. 343 par. 735.

Where it appeared that the plaintiff wished to try the right to the land, which the form of his libel did not admit of, being only an action for trespass, the case was remanded to the District Court with liberty to the plaintiff to amend his libel, and the defendant to put in such pleadings thereto as he may be advised. Both parties to bear their own costs. [No. 11621, D. C. *Colombo*.

content with each other's pleadings.

Dec. 3, (C.)

811.—*Hon. A. Buller Q. A.* v. *Perera.*

The Q. A. maysue at common law; though other remedies provided by Ordinance.

In this case the interlocutory order of the Court below was reversed with costs, and judgment was entered against all the defendants, excepting the 1st defendant, according to the 4th sect. of the general Rule of Court of the 17th June 1844. The following is the Judgment.

"This action can clearly be maintained by the Queen's Advocate without having recourse to the remedy given under the Ordinance, which does not take away the remedy at Common Law; (Com. Dig. tit. *Action upon Statute*, C; Saunder's *Pleading*, 830;) and the Queen's Advocate may, therefore, sue under the Ordinance or not, as the circumstances of each case require.

"It often happens that a Crown debtor previously conceals or makes away with all his property; and if the view of the District Judge were correct, the debtor would thereby successfully evade and estop the Crown's prosecuting him for the debt due to it.

"The object of the legislature in authorising the Government Agent or his Assistant or Deputy to act, not only upon his own knowledge, but also on *notice* to him given of any debt having accrued due to Her Majesty, was obviously to include (amongst others) the very case suggested by the District Judge: as it was preferable in conceding such summary powers to confine the exercise of them as far as practica-

ble to one channel, and to vest such extensive discretion in the principal executive officer of the district, and those acting on his behalf or authority, rather than vest the same generally in the respective officers of the various subordinate departments of the Revenue." [No. 16417, D. C. *Kandy*.

Dec. 16, (O. C. S.)

812.—*Ukku Ettena* v. *Omor Lebbe.*

The D. C. may, by consent of both parties, hear evidence *de novo*.

Where, after the abstraction of the evidence and judgment the plaintiff moved the District Court that the case may be re-fixed to hear evidence *de novo*, in which the defendant acquiesced, and on the day of trial both parties appeared, and evidence was adduced on both sides and judgment given; *held*, that such proceedings are tantamount to a new trial of the case with the consent of both parties, and will not disturb the judgment on the ground of judgment having already been given. [No. 11266, D. C. *Kandy*.

813.—*Dingiry Menika* v. *Kiry Menika*.

Non-compliance with Rule 34, sect. 1, is no ground for reversing a judgment.

Non-compliance with the terms of the 34th rule, sect. 1, Civil Jurisdiction, inasmuch as it does not state the grounds of the decision, is not an omission for reversing the judgment. [No. 14099, D. C. *Kandy*.

Dec. 18, (O. C. S.)

814.—*Candoe Natchia* v. *Sinne Lebbe.*

Liberty to amend Pleadings not limited to any particular stage of the proceedings.

The liberty given by the 4th rule of 5th July 1842, to apply to amend pleadings, is not limited to any particular stage of the proceedings; and the Supreme Court, looking at the circumstances of the District Courts of this Island at the present practice, and the practitioners, and the law of England on the subject, does not think it would be wise to deny amendment in case of a mistake where the defendants are not prejudiced.

The Costs in the District Court are left at the discretion of the District Judge, who can alone judge of the necessary expense to which the defendants have been subjected by the mistake of the plaintiffs after the trial. [No. 37061, D. C. *Colombo.*

Costs thereupon.

815.—*Babachy* v. *Don Louis.*

Where the Libel stated that the plaintiffs were "seised and possessed as of their own property" of &c, the Supreme Court was of opinion that these words were obscure, and leave the defendants in uncertainty whether the plaintiffs set out the right of property or possession only. [No. 4497, D. C. *Amblangodde.*

The words "*seised and possessed*," held to be obscure.

816.—*McKenzie* v. *Perera.*

After the admissions of the defendant made in Court, the defendant put in an Answer by leave of the Court, to which the plaintiff replied. The Supreme Court was of opinion that the case must go to trial upon the pleadings. [No. 7528, D. C. *Kaigalle.*

When a defendant has filed Answer, the case must go to trial, though he may have previously made admissions.

Dec. 20, (O. C. S.)

817.—*Bresida* v. *Rose Maria.*

"The Court has no power to strike off the case on the ground on which application was made so to do. If the Letters of Administration are produced at the trial it is sufficient. But their production cnnnot then be dispensed with." [No. 8204, D. C. *Batticaloa.*

It is sufficient if Letters of Administration are produced at the trial.

Dec. 23, (O. C. S.)

818.—*Chinnetamby* v. *Winnys.*

"By the Ordinance No. 5 of 1835 the Proclamation of 23rd September 1799 is declared to be in force, in so far as 'that the Administration of Justice and Police within the settlements then under the British dominion, and

Ord. No. 5 of 1835. Proclamation of 23rd Sept. 1799.

'known by the designation of the Maritime 'Provinces, should be exercised by all Courts 'according to the laws and institutions that 'subsisted under the ancient Government of 'the United Provinces,' and these laws and institutions are by the said Ordinance to continue in force, 'subject,' &c.

Laws and Customs of the Tamils not interfered with.

Special customs of the *Moquas* and *Wanniahs* recognized.

"The Supreme Court has every reason to believe that the laws and customs of the Tamils residing in Batticaloa, regarding the rights of succession to property, were never interfered with by the Courts of Judicature under the Dutch Government; and the special customs of the *Moquas* and *Wanniahs* were recognized in a case at the last Sessions holden at Jaffna, without its even being contended that they were abrogated." [No. 8933, D. C. *Batticaloa.*

819.—*Markoe* v. *Isoehamy.*

Trespass. Mis-joinder of parties.

The plaintiff sued the 1st defendant for money lent by plaintiff to the party whom 1st defendant now represents, on mortgage of the premises trespassed on by 2nd defendant, and which premises plaintiff was to enter upon and possess in lieu of interest. The 2nd defendant was sued for trespassing on the said premises, and damages were claimed for such trespass.

At the trial the 2nd defendant attempted to prove title in himself, and failed; and the judgment was that no damage had been proved, but that 2nd defendant was to pay all costs of suit, and that plaintiff was to recover the amount of mortgage.

The Supreme Court was of opinion that this judgment appeared to do substantial justice between all parties, and as no objection was made in the whole progress of the suit on the ground of mis-joinder of parties or accumulation of various grounds of action, the judgment was affirmed. [No, 4455, D. C. *Amblangodde.*

820.—*J. W. Huskisson* v. *J. T. Whiteside.*

Requisites of an Affidavit

In this case the Suprome Court was of opinion that the affidavit of Mr. *Vanderspaar,*

which was the only one put in, was insufficient, inasmuch as it only stated "that he doth verily "believe, and hath good grounds for believing, "that the plaintiff intends to leave the juris- "diction of the Court,"—whereas it ought to have set forth facts indicative of such intention.

for Warrant of Arrest.

The Court was further of opinion that no authority has been cited, and that no authority can be cited, to warrant the arrest of a plaintiff, at the instance of a defendant, for the purpose of obliging him to give security for contingent and untaxed costs. [No. 10883, D. C. *Galle.*

Plaintiff cannot be arrested to give security for contingent and untaxed costs.

Dec. 24, (C.)

821.—*Mendis* v. *Sosa.*

Requisites of Affidavit of Merits.

Besides the objection arising from the laches, or dilatory nature of the plaintiff's proceedings, the Affidavit of Merits in support of the application for leave to amend was, in the opinion of the Supreme Court, insufficient. It did not appear to have been sworn to, and had no date inserted; nor did it specify the nature or grounds of the intended amendments, further than by alleging generally the Proctor's belief and opinion that the plaintiff's pleadings were defective in several points, "and that consequently an amendment of the pleadings are essentially necessary." The Supreme Court cannot act blindfold on the Proctor's belief and opinion, but must be informed of the specific points of amendment, and be satisfied that the same would not have the effect of allowing the plaintiff to set up a new, or substantially different case, from the one at first commenced. [No. 3685, D. C. *Amblangodde.*

Dec. 30, (O. C. S.)

822.—*Francina Dias* v. *David Perera.*

Defloration. Oath and allegation in the Libel of previous virginity not necessary.

In an action of defloration it does not appear that the plaintiff must make oath of previous virginity in order to maintain the action, nor that the same must be alleged in the Libel.

Where in the Libel damages are claimed for breach of promise of marriage, no oath could be

Breach of Promise.

admitted according to the English Law of Evidence, and consequently cannot be admitted in this Island. [No. 35800, D. C. *Colombo*.

823.—*Caloo Appoo* v. *Jaffer Saiboo*.

A creditor cannot possess more than he elected to hold under mortgage.

Two defendants each lent an equal sum to the plaintiffs, who received it in different amounts, and mortgaged their respective premises in security. The Bond expressed that the creditors are to possess the lands as they wished. They possessed by each taking a half, and possessing it separately. One of the creditors being in want of money received the sum advanced by him from the debtors, and put the plaintiffs in possession of the half. The other creditor entered and cultivated the half so given up, and maintained his right so to do. The Supreme Court held that he had no right to occupy more than the half which he elected to possess. He advanced half the money, and he had a right to possess half the premises; and the other creditor had a right to give up the possession of his share, on being paid his money, when he pleased. [No. 7521, D. C. *Chilaw and Putlam*.

Dec. 31, (C.)

824.—*Gonetileke* v. *Wejekoon*.

Dona Maria, intervenient.

Deeds &c., insufficiently stamped not void.

The interlocutory order of the Court below was modified by the intervenient being allowed to get the document properly stamped, under the provisions of the Regulation No. 4 of 1827, sect. 2 and 18, and of the Ord. No. 6 of 1836, sect. 1 and 9, and to amend also her Petition of Intervention by more distinctly referring to, or setting out therein, the mortgage deed in question. The parties to bear their own costs in appeal, and on the order of the Court below.

"The Supreme Court concurs with the District Court as to the instrument being insufficiently stamped, because it is an obligation to secure £22 10s. with interest at 12 per cent., and on

default to transfer a share in a garden for £26 5s., or, in case of a good title thereto not being made, to pay an additional sum of £7 10s. The instrument, therefore, should bear a stamp for £30. The Stamp Laws in force in this Colony do not render deeds &c. void when stamped insufficiently, but only prohibit their being read in evidence, until the same have been duly stamped ; and the proper time to take the objections to the insufficiency of the stamp is at the trial before the instrument is read in evidence. And in the English Courts of Equity a cause has been allowed to stand over to enable a party to get an instrument properly stamped. *Huddlestone* v. *Briscoe,* 11 Ves. 595. *Chawett* v. *Jones,* 6 Mad. 267." [No. 11323, D. C. *Caltura.*

1845.—*February* 4, (S.)

825.—*Canegesoory* v. *Purengy.*

Signification of Barrator.

Judgment.] The Commissioner of the Court of Requests observes in his judgment in this case that the *plaintiff is a Barrator of the worst kind*, but of this the Supreme Court is unable to take cognizance, there being no evidence to that effect before the Court. It would appear from the books that the term Barrator is uncertain, there being three several descriptions of persons to whom it has been applied :—first, it designates an individual who barters justice, and so it is said *Baratriam committit qui propter pecuniam justitiam baraetat.* Secondly, it is used by LORD COKE and other ancient authorities, to signify a common mover, exciter, or maintainer of suits or quarrels either in Courts or in the country. And thirdly, the term *Barratry* denotes a fraud, or such a degree of culpable negligence as amounts to fraud or bad faith, committed by the master or marines of a ship with relation to the ship or cargo under his care by which the owner or freighters may be injured. [No. 15522, C. R. *Jaffna.*

826.—*Cornelis Appoohamy* v. *Caroll.*

When plaintiff can be called on to find security for Costs.

Notice of motion for a stay of proceedings until the plaintiff finds security for costs, must be given to the plaintiff. It is not clear that a plaintiff, a native of this Island, residing in it, possessed of property within it, and having no intention to remove therefrom, can be called on to find security for costs ; it can be done on these grounds only, that he does not live within the District in which the action is pending, and has no property therein. The plaintiff may have had good grounds, and should have had time given him to show cause against such security being demanded. [No. 10943, D. C. *Negombo.*

Feb. 25, (S.)

827.—*Vinesitamby* v. *Caderen.*

In the absence of direct

This was a suit brought to recover a balance of the Purchase money of a piece of land sold

to the defendant by the plaintiff. "There is no direct evidence as to any payments; and, on the one hand we have the plaintiff stating that he had received only 9 shillings of the amount, and on the other admitting to the Notary that he had received the full sum, and to another witness that he had received 30 Rds. Under these circumstances, and considering also the declaration of the defendant that he had paid the plaintiff the full amount, it appears to the Supreme Court that the defendants possession of the title deed, in which full payment is acknowledged by the plaintiff, should determine the matter in favor of the defendant." [No. 3785, C. R. *Jaffna*.

evidence of non-payment, acknowledgement by Plaintiff of receipt of Purchase money in Tittle Deed, sufficient to determine in defendant's favour.

828.—*Hon. A. Buller* v. *Thomas Clark.*

Pleadings in Crown cases.

This was a suit at the instance of the Crown in the nature of an action of ejectment, or an information of intrusion. The defendant justified his possession of the lands in question under a Bill of Sale, and moved the Court to have the vendor to him made a party to the suit. The District Judge and Assessors considered the application reasonable and granted the same.

"The Supreme Court is inclined to the same opinion; but on looking into the case it may be that the information is open to objection in respect, 1. that no title to or possession of the land in question on the part of the Crown is stated therein; and 2. that the nature of the act charged or meant to be charged, and its effect upon the Crown's rights, (supposing the property to be in the Crown,) and damage, direct or consequential, are not sufficiently set out. The proceedings are therefore remanded to the District Court to hear parties on the above points as if the same were causes of demurrer and formally pleaded, and give judgment thereon. In the event of the judgment being for the defendant on either of the points above stated, he will of course be entitled to *absolviter*. If for the plaintiff, the case will

proceed, and the interlocutory order here set aside will be made *de novo*. [No. 5709/304. D. C. *Jaffna*.

March 18, (C.)

829.—*Adiran* v. *Abedura*.

Qu ? whether a C. R. has Jurisdiction in a case where plaintiff's claim in Equity to the proceeds of land depended on his legal title to the land.

The proceedings in this case were reserved for the collective decision of the Judges on the following point:

Whether the decision should not be set aside, for incompetency of the Court in respect to excess of jurisdiction, from the matter in question relating to the title to land; as the plaintiff's claim in Equity to the proceeds of the land in deposit depend upon his legal title to the land.* [No. 30/11480, C. R. *Matura*.

April 12, (O.)

830.—*Perera* v. *Juan Allis*.

Power of D. C. to order parties to make Reports in Civil cases.

District Courts have no power to compel any parties, who are not willing, to make any inspections or reports in civil cases, and such written reports and inspections cannot be received as evidence. [No. 9866, D. C. *Negombo*.

Apr. 14, (O.)

831.—*Fernando* v. *Rose*.

Nature of default required in Notices.

Notice to shew cause why judgment should not be recorded against the defendant, must set forth the particular default; and the return of service must be sworn or affirmed. [No. 10033, and 10004, D. C. *Negombo*.

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* See Nell's C. R. p. 96. Subsequently (on the 3rd July) the full Court decided that the Court below exceeded its jurisdiction.

832.—*Siman* v. *Battelepathogey*.

The Court has no power to order Surveys: if it is necessary for the proper understanding of a case, on the day of trial, that the plaintiff should have a Chart or Diagram, and a Surveyor to explain the same as his witness, and be not so provided, the defendant will either be absolved from the instance, or the plaintiff allowed another day to prove his case, on payment of all costs. But the Court has no power to interfere by dismissing a case, because a party cannot pay the costs of a survey ordered by the Court. [No. 7753, D. C. *Negombo*.

The Court has no power to order a Survey.

833.—*Fernando* v. *Sielve*.

Where the plaintiff claimed by inheritance, *held* that he was not bound to prove uninterrupted possession. [No. 8044, D. C. *Negombo*.

Claim by inheritance. Proof of Possession unnecessary.

Apr. 15, (O.)

834.—*Wayrewen* v. *Maden*.

Where the plaintiff's Proctor moved for judgment, and in the proceedings it did not appear that the defendants had any notice whatever that such motion was to be made, the Supreme Court was of opinion that the plaintiff must have given 48 hours due notice to the defendant that, on such a day, "the Court would be moved" &c. On that day the motion must have been made, and on the hearing of that motion, the Court must have proceeded with the defendant as directed in the 7th rule of 6th July 1842. If the defendant did not appear proof of the service must have been given, by the oath or affirmation of the person who served it. [No. 536, D. C. *Jaffna*.

Notice of motion for judgment necessary. Practice.

835.—*Collett* v. *Cadramen*.

The defendant must distinctly either deny a promise, or admit the same, and avoid it by submitting that the promise cannot be the sub-

Requisites of an Answer.

ject of an action, being illegal. [No. 9889, D. C. *Batticaloa.*

836.—*David Appoo* v. *Silva.*

Notice of Judgment must state default.

The judgment in this case was set aside, as the Notice of motion for judgment by default did not state the default. [No. 9676, D. C. *Negombo.*

837.—*Harmanis* v. *Kosalhamy.*

Service of Summons must be sworn to. Notice of default.

Service of the Summons must be sworn to or affirmed to, and in the Notice that judgment by default will be moved for the default, the default must be mentioned. [No. 10302, D. C. *Negombo.*

Apr. 22, (O.)

838.—*Pakeer Bawa* v. *Peria Tamby.*

Judgment for Plaintiff cannot be affirmed when doubtfully expressed.

The Supreme Court cannot affirm a judgment doubtfully expressed, when the judgment is in favor of the plaintiff. *Set aside*, and the plaintiff *nonsuited.* [No. 33122, D. C. *Colombo.*

May 6, (S.)

839.—*Packier* v. *Sinne Tamby.*

Cattle trespass. It is the *owner's* duty to look after the cattle.

In all cases where cattle are seized and impounded for trespass, it is the duty of the *owner*, not of the distrainer, to take notice thereof, and look after such cattle. Where by delivering over the bullock to a Headman, as customary in cases of trespass by cattle, the defendant discharged himself of all responsibility for the animal, and the bullock died without the fault of the defendant, the latter is not only not liable to damages, but has still his action against the plaintiff for the trespass. [No. 117, C. R. *Kandy.*

May 13, (S.)

840.—*Walliamime* v. *Cader Lebbe.*

Documents should be produced.

All documents founded on by parties in a suit should be produced to allow inspection thereof. [No. 10007, D. C. *Batticaloa.*

May 20, (C.)

841.—*Baale Appoo* v. *Dingy Hamy.*

Where a Mortgage Bond affected the title of the land thereby secured, and possession thereof was also granted in lieu of interest; *held* that the Court of Requests ought not to have heard the case upon its merits, and adjudged the plaintiff's mortgage deed null and void; but ought to have dismissed the case with costs for want of jurisdiction. [No. 336, C. R. *Tangalle.*

Jurisdiction C. R.

June 3, (C.)

842.—*Coosal Hamy* v. *Mudelihamy.*

If a plaintiff confines his claim to damages for a forcible entry on the land, and possession of the crop by defendant, while the same were in the occupation of the plaintiff, contrary to the provisions of the Proclamation of 5th August 1819, the Court of Requests might sustain jurisdiction in the case, as the matter will not relate to the *title* of the land, but simply as to whether the provisions of the Proclamation was infringed by the defendants forcible entry and possession of the crop, without the authority of a competent Magistrate, while in the occupation of the plaintiff. Upon similar grounds, the Rules give forms of action for breaking and destroying fences, and injuring crops, &c., where the *title* is not the matter for adjudication, but the amount of damages for the trespass. [No. 128, C. R. *Kaigalle.*

The C. R has jurisdiction under Procl. of 5th Aug. 1819 in claims for damages.

843.—*Andris Appoo* v. *Pusba Dureya.*

The amended Answer filed in this case by the defendant was ordered to be taken off the record, because the motion to file such amended answer had been made without due notice to the opposite party; and as no Affidavit of merits had, moreover, been filed, nor other sufficient cause appear, on the proceedings, to have been shewn for allowing the defendant by an amended answer, to set up an entirely new case against the intervenient's claim. [No. 2353 D. C. *Kandy.*

Affidavit of Merits and Notice to opposite party necessary before an amended Answer is filed.

July 1, (C.)

844.—*Ossen Pulle* v. *Sahabdulkader.*

Action for defamation will not lie for words used during the course ef a legal proceeding.

An action for defamation will not lie for words used during the course of a legal proceeding by the defendant, as a party to a suit, on his objecting to the plaintiff's evidence, when the plaintiff was examined as a witness against the defendant. *Weston* v. *Dobinet*, Cro. Jac. 432. [No. 628, C. R. *Calpentyn.*

845.—*The Hon. A. Buller* Q. A. v. *Mendis.*

Where the D. J. as A. G. A. was concerned in case, it was transferred to another Court.

On the motion of the Queen's Advocate, with the consent of the defendants, and it having been made to appear to the satisfaction of the Supreme Court that the Judge of the District Court of *Chilaw* and *Putlam*, wherein the above cause was pending, was, as Assistant Government Agent of the said places, concerned in the said cause, It was ordered that the said case be transfered to the District Court of Negombo for the hearing, trial, and decision of the same. [No. 1879, D. C. *Chilaw and Putlam.*

July 3, (O. C. S.)

846.—*Gamuda* v. *Pattanmaly.*

Ukkinda, intervenient.

Parol sales. Ord. 7 of 1834.

"At the time when the land was purchased by the plaintiff there was no law which prevented au interest in land being set up by parol evidence, and there is, therefore nothing to preclude the defendants and the intervenient from showing any verbal agreement which they or those whom they represent, may have entered into with the plaintiff at the time of the purchase, in respect of the conveyance or possession among themselves of so much of the land as corresponded with the proportions of money alleged to have been respectively paid by them or otherwise,

"The Ordinance No. 7. of 1834 which repealed the Proclamation of the 28th of October 1820, if it meant to prevent sales &c. of land from being made by parol, is defecttve in this

respect, as it only requires that if such sales &c. be passed in writing on or after a certain day, such writing must be executed in a certain manner; but the Ordinance is silent as to parol sales, agreements &c., and so this Court has decided in former cases."* [No. 15378, D. C, *Kandy*. (Coll.)

847.—*Sidde Lebbe* v. *Sinne Lebbe*.

The agreement in this case was for establishing an interest affecting land, and, not being in writing, was held to come within the 2nd sect. of the Ord. No. 7 of 1840; and therefore void.

Instrument affecting land and coming within § 2 of Ord. 7 of 1840, is void.

(For further elucidation of this decision, the observations which fell from the *Chief Justice*, who delivered the judgment of the Court, are appended.)

"In this case the produce was not in existence. In the cases of *Evans* v. *Roberts*, 5 B. & C. Mr. JUSTICE LITTLEDALE was of opinion that the crop must be in actual existence at the time of the contract, and in none of the many cases bearing upon the point in question, is a contrary opinion intimated by any one Judge. The crop not being in existence at the time of this agreement, no goods or chattels or moveable property then *in esse* passed. What was intended to be passed was an interest in produce to be raised from the land. Now, if this be not an interest in land, what is? A valuable interest in land must either be derived from what can be produced from its surface, or placed on its surface, or dug out of its bowels: and the first of these is the most general and the greatest interest. If A, a proprietor of land, agree with

* This case was heard on Circuit, and the judgment of the Court below was affirmed, subject to the opinion of the Collective Court whether the appellants ought to be let into evidence of the plaintiff being a trustee of the portion claimed by them, and if the plaintiff, upon satisfactory proof thereof, can be compelled by a decree to transfer such portion over to the defendants. See *Midland Circuit Minutes*, 9th *October* 1844.

B that for a certain quantity of manure to be supplied, or a certain sum of money to be paid by B, A would give him half of all the crops the lands should produce for one year or ten years, would not B acquire a half interest in the surface of the soil? To hold an agreement such as the one in this case, not to be within the Ordinance, would be to nullify it altogether, and to allow the substantial and valuable interest in land to pass without an agreement in writing". [No. 10286, D. C. *Negombo*.

July 8, (C.)

848.—*Janis* v. *Babonchy*.

D. C. may alter an Interlocutory judgment.

Although a District Court cannot alter any final decree, yet its preparatory or interlocutory judgments may, at any time previous to the final decree, be altered, amended, or even retracted by it. [No. 5544, D. C. *Galle*.

849.—*Agemadoe Lewe* v. *Odomanyna Ismail*.

Treble costs.

The Court of Request have no power to award treble costs.* [No. 193, C. R. *Batticaloa*.

July 9, (O.)

850.—*Cornelis Soyza* v. *Jeronis Silva*.

Illness of Proctor a good cause for postponing a trial.

Where the District Judge reported that the plaintiff's Proctor was absent from illness on the day fixed for the trial of the case, when the defendants were absolved from the instance, it was ordered that the appeal be allowed notwithstanding the lapse of time. If a suitor employs a Proctor it is not expected that the suitor shall be present at the trial, and the illness of the Proctor, if known to the Court at the time, is a good cause for postponing the trial on payment of the costs of the day. [No. 3582, D. C. *Ratnapoora*.

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* See Nell's C. R. p. 88.

July 11, (O. C. S)

851.—*Young* v. *Shand.*

By whom cases can be postponed. Notice when interlocutory judgment is to be made final necessary.

The Commissioner can alone postpone a case and fix another day for the hearing of it. It is necessary that a defendant should have legal notice of the day on which interlocutory judgment entered against him is to be made final. [No. 86, C. R. *Ratnapoora.**

852.—*Sidowy* v. *Sinny.*

G. W. Collette, appellant.

A Proctor cannot be cast in costs of suit for reporting that plaintiff, a pauper, had a good cause of action, unless he was guilty of gross negligence.

In this case the District Court of *Tenmoratchy and Patchelapalle* condemned the appellant, a Proctor of that Court, (who had reported that the plaintiff, a pauper, had a good cause of action,) to pay all the costs of this suit, excepting those of one defendant, on the ground that, " had he made the slightest enquiry from " the witnesses, or the most cursory examina- " tion of the documents upon which the plain- " tiff founded her claim, he would never have " reported favorably for the plaintiff." At the time when the decree was made, (2nd Sept. 1844,) the appellant was not Proctor for the Plaintiff, the latter having given a proxy to Mr. *Williamsz* on the 31st March 1843. Neither was the appellant in Court or residing at Chavagacherry, nor does he appear to have had any notice to attend the Court when the judgment against him was pronounced; nor, so far as appears on the proceedings, had he any notice of the judgment until the 27th of March 1845, and after the case had been transferred to the District Court of Jaffna. On the next day he showed cause why he should not pay the costs, but the District Court of Jaffna held, that as he had not appealed against the judgment of the District Court of *Tenmoratchy and Patchelapalle*, it could not interfere, and that full effect should be given to the judgment. The appellant appealed and the whole case was reserved for the consideration of the Supreme Court at General Sessions;

* Interlocutory Judgments are unknown to the present C. R. Ordinance No. 8 of 1259. *Ed.*

and the opinion of the Supreme Court was that there was nothing in any document filed which should have satisfied the appellant that the plaintiff had no good cause of action, and that it was impossible to conclude that the witnesses told the appellant the same story they did in Court, and generally that there was not such gross negligence on the part of the appellant as to render him liable for the costs. And the Court further found that, at the time when judgment was given by the Court of *Tenmoratchy and Patchelapalle*, the appellant was not employed in the case, and was not presumed to be in Court or to know anything of the judgment, and that therefore the judgment was not binding on him, and so far as regards him it should be reversed. [No. 4517, D. C. *Jaffna*. (Coll.)

853.—*Agemado Lewe* v. *Nyna Markair*.

In this case the plaintiff complained that the defendant took out a Writ against the husband of a Moorish woman, and sequestered land which that woman had, during her coverture, sold to him. The deed of sale in favor of the plaintiff was from the woman alone, and the conveyance to her is to her alone. The defendant pleaded that the sale to the plaintiff was fraudulent, it having been made after the sequestration of the land; but he did not allege that the conveyance to the wife was done with a view to defraud him, the defendant, or creditors generally, and there was nothing to show that his debtor, the husband, was in his debt at the date of that conveyance. The plaintiff replied that the land was given to the wife by her brothers; and admitted that if it had been acquired by the married pair, the conveyance would have been either to both the husband and wife, or to the husband alone. The defendant, in his Rejoinder, offered to prove, if called upon to do so, that the money paid for the land was the husbands, and denied that the plaintiff was right in his law, which he, the plaintiff said, was to be found of date the 1st August 1806. The District Court found that the land was

acquired property: at least, that, in the absence of proof of the alleged gift by the brothers, it should presume so; and also held that the defendant was entitled to sell, under his Writ, half of the said land as the husband's share.

Judgment. It appears to the Supreme Court that the case should be remanded to the Court below, to take proof as to who furnished the funds for the purchase of the land in question; and if it be proved that they were furnished by the brothers of *Mymoonachi*, the plaintiff's vendor, then to take the opinion of Moorish assessors whether, in such case, it is to be treated as an acquisition or not; but if it be proved that the same was purchased by funds belonging to the vendor and her husband, then it should be put to such assessors whether the land could in such case be conveyed to the wife alone, and be treated as her separate property. [No. 8169, D. C. *Batticaloa* (Coll.)

854.—*Jayewardene* v. *Seniweratne.*

Costs in a case are part of the sentence, and not prescribed as a book debt.

Judgment given in this case in the District Court on the 26th August 1840 was,—"That the plaintiff's case be dismissed, and that he do pay costs." No step was taken on the part of the defendants for the recovery of the costs awarded by that judgment, until the 29th of November 1843, when, on the application of the defendant's Proctor, it was ordered by the District Court that the plaintiff should be summoned to shew cause why a Writ should not issue. The plaintiff showed for cause that the debt had prescribed, it being, as he called it, a "book account," and the application for execution not having been made until after the lapse of three years. The District Court, thereupon, gave judgment that execution should issue.

Judgment affirmed. In the *Censura Forensis* part 2, lib. 1, ch. 31. p. 142, it is laid down as one of the requisites of a sentence—"*ut sumptuum et expensarum condemnationem, aut compensationem contineat. Regulariter enim victus victori in expensas judicis arbitrio taxandas, et moderandas, condemnari debet.*" It

is also stated in Van Leeuwen's *Inst.* that the costs are part of the sentence, p. 631 *et seq.* This is, therefore, no book debt between the plaintiff and the defendant, but a judgment debt which has not prescribed. With regard to the costs not having been taxed until after three years after the sentence, this does not affect the case, for the costs were given by the judgment, and the rule "*certum est quod certum reddi potest*" here applies. [No 6666, D. C. *Chilaw and Putlam.*

July 15, (C.)

855.—*Wayremotto* v. *Phillippen.*

Where Bond is denied, proof of execution indispensable.

Where the defendant denied the granting of a Bond, and there was no proof of the execution of it; *held*, that the Court ought to have required proof of the execution, instead of dispensing with it from the Commissioner's personal knowledge of the respectability of the Notary. [No. 419/5184 C. R. *Jaffna.*

856.—*Baba Hamy* v. *Baba Appoo.*

Plea or Exception need not be verified by Affidavit.

There is no law or rule of practice in this Colony requiring a dilatory plea or exception to be verified by Affidavit. Pleas in abatement in England are required to be so verified by express provision of the Statute, 4 Ann. c. 16. s. 11, which does not extend to this Colony; but the 2nd defendant ought together with such a plea to answer over on the main question. Vander Linden, 415. [No. 12149, D. C *Chilaw.*

July 24, (O. C. S.)

857.—*Gilbert* v. *Williamsz, widow Rulack.*

Where plaintiff sued as heir to eject defendants, who were under a Codicil allow-

In this case the first plaintiff as the heir of the late *Thomas Nagel*, and the second plaintiff as the only surviving Executor of his Last Will, brought an action to eject the defendants from a house, which the plaintiffs alleged the said *Nagel* by a codicil "allowed the 1st, 2nd, 3rd, and "5th defendants to inhabit and reside in, on

"condition that the title deed thereof should "remain with his Executor to prevent the "same being sold or mortgaged." The grounds on which the plaintiff sought to eject the defendants was that they, the defendants, are allowing the premises to go to ruin. The plaintiffs adm the defendants to have been in possesion of the premises more than twenty yenrs previous to the commencement of this suit. The defendants denied that the house belonged to *Nagel*, and siad that they never possessed it through him. They also pleaded prescription in bar of plaintiffs action. The plaintiffs produced no title deed to prove that the house was ever conveyed to *Nagel*, but a witness was called by them who swore that he was present when *Nagel* bought it at Auction thirty years ago; and admissions of one of the defendants have been proved which go far to show that the house was part of *Nagel's* Estate. The District Court found that the defendants were entitled to judgment as having acquired a prescriptive title; and, on appeal, the whole case was reserved for the decision of the Judges collectively, and the case having been considered at the general Sessions, the Supreme Court was of opinion that there was not sufficient evidence of undisturbed possession on the part of the defendants, by a title adverse to, or independent of the plaintiffs, to entitle the defendants to a judgment in their favour; and that the plaintiffs did not make out their case to entitle them to judgment. The decree of the Court below was set aside, and the defendants were absolved from the instance, without costs. [No. 14357, D. C. *Jaffna*. (Coll.)

ed to reside on the premises, and the D. J gave Judgment for defendants on the strength of their prescriptive title, the S. C. decided that there was not sufficient evidenceofundisturbed possession by defendants by title adverse to and independent of plaintiffs, and absolved defendants from the instance.

858—*Weireman* v. *Jayesondra*.

The parties in this case brought an action jointly against one *Theodoris de Silva Ameresinhe Aratchy* in the District Court of Galle, No. 3079, and it was decreed therein, "that "the case be dismissed, the plaintiffs paying "the costs." A Writ of Execution was issued

Where two plaintiffs were cast in costs, and one of them paid the whole amount, and

afterwards instituted a case to recover half the amount so paid from the other plaintiff, and the D. J. thought his claim prescribed by Ord. 8 of 1834, clauses 5 and 6 S. C. set aside the judgment and considered costs to be a joint and several debt and as such a compulsory payment.

upon that judgment against both the plaintiffs and one of them paid the whole costs, and after the lapse of three years, brought the present action to recover half the amount so paid by him, from his co-plaintiff, the present defendant. The defendant pleaded the 5th and 6th clauses of the Ordinance No. 8 of 1834 in bar of the plaintiff's claim, and issue was joined on their applicability to the case. The District Court held the plea of the defendant good, and the case having been brought before the Supreme Court on Circuit, by appeal, it was reserved for the opinion of the Judges collectively, and argued before them at the General Sessions.

Judgment. Decree set aside, and the plaintiff to recover from the defendant the sum of £6 15s. 3¾d. and interest. It has been urged before this Court on the part of the respondent that the appellant was not in the former case liable to pay the whole of the costs, and that each of the co-plaintiffs, in that case, was by that judgment bound to pay only his share of those costs and no more. (Voet. lib. 4. tit. 1. s. 24.) That the payment upon which the present action is founded was voluntary, and that therefore the case comes under the 5th clause of the Ordinance as either a "contract relating to moveable property," or "money lent without bond &c." That monies and debts of this kind class under the head of "moveable property," (Van. Leeuwen's *Comm.* p. 102. Swinburne *On Wills*, vol 3, p p. 928—936;) but it might even fall under the head of "money lent," as the distinctions of "money paid," "laid out and expended," "had and received," are creatures of the English Law, by which they would all class under the head *mutuum*. That the appellant as the *negotiorum gestor* of the respondent, his co-plaintiff in the former case, paid money for him, and the transactions ought to be looked upon as a *mutuum*. (Vinnius *Inst.* lib. 3. tit. 17. p. 627) That there is a case similar in some respects to the present, and in which such a transaction has been, even by the English

Law looked upon as a case of money lent. (*Wade* v. *Wilson*, 1 East, 195.) That the Ordinance, like the English Statutes of Limitation, which have been emphatically termed "Statutes of Repose" (2nd Chitty *on Stat*, p. 697, *in note*,) ought to be liberally and beneficially expounded, and therefore ought to be considered to include cases of "money paid," "laid out and expended," &c., (2nd Chitty *on Stat*, p. 702. Blanchard *on Limitations*, p. 87.) That the appellant had no cession of action, and has not therefore the same rights as the judgment creditor. That without this cession he has *proprio nomine* an action *pro mandati* or *pro socio*; (Vinnius lib. 3, tit. 17. p. 627. Voet lib. 45. tit. 2 sect. 7. Pothier *on Obligations*, vol. 1. p. 166 ;) and the judgment not being the basis of the present action, but only collateral evidence in support of it, the prescription of a judgment would not apply.

But this Court is of opinion that although the Dutch Law may be as stated by the learned counsel for the respondent, yet this Court is bound by its decision of the 28th December 1837, in the *Amblangodde* case No. 1676,* and by the practice having been invariably such as stated therein. It is now established that when parties are condemned in costs generally they are all liable *singuli in solidum*, and it follows, therefore, that this was not a voluntary but a compulsory payment. The Court is further of opinion that an argument cannot be maintained, as indeed none was offered, that the case comes under the 6th sect, and the only question has been whether it comes under the 5th. As the payment is held to have been a compulsory one, this action cannot be said to be for the recovery of "money lent." Neither is it founded upon an unwritten "promise contract, bargain, or agreement relating to moveable property," and the only question which remains for consideration is whether it is action "for any moveable property." The

* See Morgan's *Digest* p. 203, par 545.

words " moveable property" must be construed in the limited sense of corporeal property, exclusive of choses in action. For, otherwise, after the words " moveable property" should have been inserted the words " except as aforesaid," to shew that the 5th section was not repugnant to the two immediately preceding it, and which provide different terms of limitation for the moveable (taken in the wide sense of the word) therein mentioned. Neither can " moveables" have been intended to comprehend money ; for then there would have been no occasion to add the words " or to recover money lent." The Court has no reason to suppose that under the term " moveable property" it was meant to include either action to which a plaintiff had a right by action, or which he was entitled to bring *eo nomine.* [No. 3262, D. C. *Galle.*

Aug. 5, (O.)

859.—*Cader Bibie* v. *Nicol Qualies.*

Non-payment of costs by a pauper no bar to his proceeding on with the case.

The following order was made in this case:—"That the plaintiff be at liberty to amend her libel, and pay any costs the defendant may incur by her so doing ; but that as the plaintiff has been admitted to sue *in forma properies*, the non-payment of such costs shall not be any bar to her proceeding with the action."

Estimated value of articles proved to have been stolen, and not account for, can be recovered from defendant.

Where the plaintiff cannot be supposed to know accurately the articles claimed by her, nor the precise value thereof, the Supreme Court directed her to insert all things which she presumed to have been taken away by the defendant, and the estimated value thereof, and whatever of these she could prove to have been taken and not accounted for by the defendant, she will be entitled to recover from him. [No. 4469, D. C. *Manaar.*

860.—*Trywane* v. *Sengerepulle.*

Taxation of costs—Practice.

On the 7th April an application was made by way of motion for a notice on the defendant

to be present at the taxation of costs. And the same waa ordered by the Judge.

" The 41st rule of sect. I, Civil Jurisdiction, does not suggest the necessity of coming to the Court in the first instance, but only after the taxation has been made by the Secretary if either party be not satisfied; and the rule of 30th December 1844 clearly points out the practice to be adopted. Instead of troubling the Court the plaintiffs Proctor should have applied to the Secretary of the Court to appoint a time for the taxation of costs, and given notice thereof to the defendant's Proctor, if he had one, or to the defendant, if he had none. At the time appointed the Secretary should have taxed the costs in his own office, and if either party were dissatisfied, then, for the first time, should the Court have been applied to.

" Then follow two irregular orders consequent on the former, and on the 26th the defendant is required to *file* objections in Court to a Bill of costs which the Secretary has not yet taxed, and the objection is by another order referred to the taxing officer, all of which proceedings appear to be irregular and against the Rules." [No. 5578, D. C. *Walligamo*.

Aug. 19, (O.)

861.—*Salman* v. *Juan*.

Affidavit of merits by itself, not sufficient to purge defendant's default.

Practice of local Court.

" The Court is not obliged to be satisfied by an 'affidavit of merits' in all cases, but may be satisfied on " other sufficient grounds" that the defendant ought to have leave to purge his default; but the defendant and not the plaintiff, ought in such cases to pay the costs occasioned by the default. The plaintiff appears to have acted regularly according to the practice adopted in the Galle Court, and admitted from the alleged necessity of the case, namely, by serving the notice of motion for judgment thro' the Sheriff, instead of moving for judgment in Court, and there proving the service of notice that such motion would be made, as the rule

prescribes. It is, therefore, ordered that the interlocutory order of the Court below be set aside and that the defendant have leave to purge his default on payment of all costs occasioned thereby, and be allowed to file Answer within eight days after notice of this order," [No. 11735, D. C. *Galle.*

862.—*Maersayboe* v. *Canden.*

Where Notice and copy of Pleading not correctly copied and served, the Proctor cast in costs. It is unprofessional for a Proctor to draw pleadings without a Proxy.

Judgment.] The 6th rule of 1842 requires a "notice with a copy of the pleading filed to be served" &c., the object of which is to avoid the necessity of the party receiving the same coming up to Court to examine the original pleading, and to enable him to give his Proctor instructions to draw his counter-pleading. It is, therefore, with the copy that he has to do, and not with the original. It wasthe duty of the Proctor for defendant to draw the notice and copy correctly; he has not done so, and has occasioned the mischief and expense which has followed. It is, therefore, ordered that the interlocutory order of the Court below be *affirmed,* save as to such part therof as relates to the payment of casts, which shall be paid by the Proctor for defendant. It is further ordered that the plaintiff do either join issue with or reply to the answer within eight days after notice of this order. The Libel purports to be drawn by *W. Martensz* Pr, which letters "Pr." are supposed to mean Proctor, but no proxy is filed by him. Surely no Proctor draws pleadings irregularly as a Petition drawer, if so he is cautioned against such an unprofessional practice in future. No. 880, D, C. *Jaffna.*

863.—*Bird* v. *Sinne Markar.*

Proctor may elect to proceed without an Advocate; but he cannot do the

In a case of a simple nature upon a Promissory note, it is competent for the Proctor for plaintiff to make his election either to do all the professional business himself without employing an Advocate, or to employ an Advocate

to do that branch of the business more proper for the Advocate; but it is not competent for the Proctor to do the Advocate's more peculiar work, to charge for the same, and to employ an Advocate to peruse and sign. [No. 423. D. C. *Colombo.*

Advocate's work and charge for it.

Sept. 2, (O.)

864.—*Don Bastian* v. *Cripps.*

The Court is not able to draw any distinction between this case, and the case of a correspondence between an Agent of Government and a Secretary of State, which, on grounds of being prejudicial to public interests, is not permitted to be disclosed. Phillips *Evid.* vol. 1, p. 181, ch. 6. sec. 2. [No. 10965, D. C. *Galle.*

Disclosure of State correspondence prejudicial to public interests.

865.—*Mudianseley* v. *Madolumea.*

Defendant had no right, on account of trespass, to break an animals leg by any law at present in existence of which the the Court is aware. *Vide* Ordinance No. 2 of 1835. [No. 152, C. R, *Ratnapoora.*

Trespass will not justify injury.

Sept. 9, (O.)

866.—*Don Domingo* v. *Walon Appoo.*
Menik Hamy, intervenient.

On the 16th April Proctors for plaintiffs and defendants being present, the case was ordered to stand out of the trial roll and intervenients to amend; on the 16th July, the amended petition was filed, and on the 17th a motion was made to reinstate the case. The District Court refused, and the Supreme Court thought properly. The plaintiff's Proctor should have resisted the case standing out of the roll when he had an opportunity on the 16th April. [No. 34872, D. C. *Colombo.*

Where the Proctor for Plaintiffs allows a case to be struck off the T. R. to allow intervention, he cannot move to reinstate the case.

867.—*Sedembranader* v. *Sangerapulle.*

Judgment] The Country law either follows or concurs with the Dutch law in so far as,

By the Dutch and country Laws, the principle that interest is not to exceed principal applies only to interest in arrear.

when interest is in arrear, and such arrear exceeds the principal, no more interest is allowed then the amount of the principal that is to say, the principal must be paid, and a sum equal thereto as interest, but no more. (It may be difficult to say upon what grounds such a rule was established; it is unknown to the English law.) But when interest is not in arrear, no such principal as has been recognized by the Commissioner, obtains in the Dutch law, nor in the Country law; at least, the case has never been attempted to be argued. Neither is there any Equity, so far as the Judge can perceive before whom this case comes, in the principle. On the contrary, it is equity that every man should receive back the whole amount of the money he has lent, and a reasonable compensation for its use. Upon the principle adopted by the Commissioner, one who has lent say £100 at ten per cent for ten years, and who has regularly been paid £10 a year as interest, would not be entitled to demand his £100 at the and of the tenth year, because he had been paid that sum in the shape of interest. He has, thus, lent £100 for ten years, and is paid back by instalment of £10 a year, getting no compensation whatever for the use of his money. Is this equity? The same reasoning holds if interest should be paid for 30 years, in which time the lender would have received three times the amount of his principal, as in the case in dispute. The lender is the party wronged if he does not get £10 every year, and his principal when he calls up the bond. The defendants being absolved from the instance on this point, it is ordered that the judgment of the Court of Requests of Jaffna be set aside, and the case be decided on the general merits thereof. [No. 275, C. R. *Jaffna.*

Sept. 23, (O.)

Lieme v. *Lieme.*

Consideration express.

Where the deed of sale expressed that the consideration had been received, *held* that such

expression was clear and unambiguous. By the English Law of Evidence, made the law in this Colony, the plaintiff was estopped from shewing that no money was paid. Phillips *On Evid,* ch. 7, sec: 4, edit. 1843, p. 351, vol. 2. [No. 164, C. R. *Negombo.*

ed in Deed is a bar to the plea that no money was paid.

869.—*Ukkoe Menika* v. *Ibrahim Pulle*

The Libel complained that the defendant had taken possession of the Eastern half of the chena A. H. and the Northern half of the Chena C, that the said Chenas are appurtenances of the lower half of the field W, which is plaintiff's, and that plaintiffs possessed the chena as such appurtenances for twelve years. The Answer stated that the defendant did not know what precise part of chena A plaintiffs claimed but admitted possession of 9 pelas thereof.

Judgment. The Answer is defective. For the Libel distinctly claims the Eastern half of the chena A, and the Northern half of the chena C, a description sufficient to let the defendant know what is claimed. The defendant has explicitly stated that he possessed nine pelas of A, but he does not deny that he does not possess the remainder of A, neither does he admit or deny whether he possesses the chena C, nor whether the plaintiffs have been 12 years in possession of the Eastern half of A, and the lower half of C, all of which ought to have been done.

Demurrer—causes of, and manner of pleading. Costs.

The plaintiffs should therefore have shewn as causes of demurrer that the defendamt neither admitted nor denied whether he had taken possession of the whole of the Eastern half of the chena A, and the northern half of the chena C, and that he had neither admitted nor denied that the plaintiffs had been in possession of the said portions of chena since the decree. Leave therefore is given to the defendant to amend his answer either as above or otherwise, as he may be advised. If he does not chose to alter his answer, leave is given to the

plaintiffs to amend their demurrer. If the defendant amend his answer leave is given to the plaintiffs to withdraw their demurrer and file such other pleading as they may deem necessary. Each party to pay his own costs. [No. 16885, D. C. *Kandy.*

Oct. 14, (S.)

900.—*Meera Lebbe* v. *Walliar.*

Rights in future.

Where it appeared that by a judgment in a case rights in future would be barred, the Supreme Court ordered that the case should be tried not in the Court of Requests, but in District Court.* [No. 462, C. R. J*affna.*

Oct. 31, (C).

901.—*Nona Maria* v. *Lenchy Hamy.*

Judgment by default..

Notice of motion for judgment by default is insufficient, from its not expressly specifying that the motion would be made for default of answer. [No. 10567, D. C. *Negombo.*

902.—*Salgadoe* v. *Franciscoe.*

Money paid as amends for redelivery of cattle no bar to action for damages.

Where a party is desirous to have his cattle immediately re-delivered he may make amends, and then bring an action for trespass for taking his cattle, and particularly charge the money so paid by way of amends as an aggravation of the damage occasioned by the trespass. *Linden vs. Hooper*, Cowp. 418. [No. 10711, D. C. *Negombo.*

903.—*Peris* v. *Fernando.*

The proceedings in this case were remanded back to the District Court to refer the petition to sue an appeal *in formâ pauperis* to the Proctor in rotation, as described by the 43rd cl. of the 1st sect. of the General Rules and Orders

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* See Nell's *C. R.* p. 91.

of the 1st October 1833. "Such reference ought to be always made to some Proctor who has no interest in the event of the suit, and who can act independently between the parties. It is a public duty that he has to perform, and one which is imposed on him under the Rules of Court, to ensure the more effectual administration of Justice between the parties, as whenever one party is improperly allowed to sue *in formâ pauperis,* he gains an undue advantage over the opposite party, and the litigants are thereby placed upon unequal terms. The Proctor, therefore, who has been retained for the appellant throughout the case, ought never to be called on to discharge this duty, inasmuch as his services are retained in favor of his own client, and he may be compelled on such a reference to act against his own client, whilst he has also himself a personal interest in carrying on the appeal, because, if the decree of the District Court be thereupon reversed, he may recover his full costs from the opposite party, which he might despair of getting, otherwise, from his client being a pauper." [No. 10256, D. C. *Negombo.*

Rules as to guidance in reference to pauper petitions.

904.—*Lebbe Marikar* v. *Fernando.*

A promise must, under the 21st clause of the Ord. No. 7 of 1840 be in writing, and signed by the party making the same, to charge him with the debt, default, or miscarriage of another Where the defendant had not availed himself of this objection under the Ordinance until the appeal, both parties were decreed to bear their own costs of the suit, and the defendants Proctor was disallowed his costs of the hearing in the District Court. [No. 10166, D. C. *Negombo.*

Undertaking under Ordinance 7 of 1840.

In re *Pauloe Fonseka.*

905.—*Fernando* v. *Fonseka.*

According to the English Law there cannot be a joint or mutual Will, an instrument of

Joint Wills not

known to the Law of England.

such a nature being unknown to the Testamentary Law of that country. Williams *On Executors*, p. 9. But by the Dutch-Roman Law married persons are accustomed to make a joint last Will, which is called "a mutual testament," and which, although contained in one paper, is held as two distinct Wills, wherein each disposes of his or her property. *Vander Linden*, p. 129. *Van Leeuwen*, p. 223. [No. 10866, D. C, *Negombo*.

Nov. 7, (C.)

906.—*Don Bastian* v. *Lewe Tamby.*

Judgment by default, notice.

A notice of motion for judgment by default is insufficient, when it does not specify the nature of the default. [No. 10932, D. C. *Negombo*.

Nov. 14, (C.)

907.—*Jasundere* v. *Mudelihamy.*

Joint action for slander against several persons not maintainable for same words.

A joint action cannot be maintained against several persons for speaking the same words, because the words of one cannot be the words of the other. Arch. *Civ. Plead.* p. 68.

On a motion for judgment by default in any action brought for excessive damages, the Court ought also to follow the 4th rule of the general Rules and Orders of the 17th June 1844. [No. 5137, D. C. *Ratnapoora*.

908.—*Rajepakse* v. *Rajepakse.*

In this case the appeal petition was rejected, it not appearing on the face of it to have been drawn ann signed by a Proctor for appellant pursnant to the Rule requiring the same.

Petition of appeal must be in English.

"The Supreme Court requires all pleadings before it to be in English, and as it is a material part of the Petition of Appeal that it should appear to have been drawn and signed by a Proctor, the Court will not resort to an interpretation of any Singhalese writing thereon, to know if its rule has been duly complied

with in this respect. The presumption also is if a Proctor cannot even sign his name and description as Proctor for appellant, in English characters, he cannot have drawn the petition filed in English, but that it is a translated copy by another person, to the correctness of which the native Proctor cannot certify from his apparent ignorance of the English language. If the Proctor signs in English it implies that he can read it, and that he has read and adopted the petition, but there are no grounds to infer the same from his signing in Singhalese characters, any more than there would be from his signing only with a mark. *Cappel's Case*, 1 M. and R. 395.

A Proctor signing in English must be presumed able to read English.

"In some of the District Courts native Proctors having been admitted under the old system, have been continued and allowed to file pleadings attested by themselves in Singhalese or Malabar characters, provided the same were signed by the parties themselves whose signatures are also sufficient, as such pleadings are not required to be drawn and signed by a Proctor, like Petitions of appeal; but whenever any native Proctor files any pleading, written motion, or other document on behalf of his client, which is signed only by himself as Proctor, in Singhalese or Malabar characters, the District Court ought always to reject the same, unless the Proctor can satisfy the District Court that he can read, and knows the contents of, such papers. The District Court will allow the appellant to file a proper petition (if he be desirous to do so) notwithstanding the lapse of time; and the Proctor signing this Petition is disallowed his costs thereof." [No. 49, D. C. *Ratnapoora*.

Nov. 18, (C.)

909.—*Palupa* v. *Fernando*.

The Supreme Court will not receive a Petition of appeal as duly drawn and signed by a Proctor, in conformity with the rule requiring

the same, unless the Proctor subscribe his name and description in English. If the Proctor is unable to do so, and sign in Singhalese or Malabar characters, it is *prima facie* evidence that he has not drawn the petition, and cannot certify to the correctness of it as a translated copy. [No. 5157, D. C. *Ratnapoora.*

910.—*Zoyza* v. *Tabrew.*

The several Rules of Court form parts of a whole system and must be read together.

The Supreme Court does not think that the latter part of the 38th clause of sect. 1 of the Rules and Orders cannot apply to any of the subsequent Rules of the 2nd July 1842. The subsequent Rules are engrafted upon the others and form part of a whole system, to be construed together; just as several acts of Parliament upon the same subject are to be taken togthere as forming one system, and as interpreting and enforcing each other. 3, Harrison's *Digest,* tit. Statute 1—6. [No. 33558, D. C. *Colombo.*

911.—*Pieris* v. *Hopman.*

Where contract of tenancy is provable evidence of title not required.

Where an actual contract of tenancy can be proved, no proof of title is requisite, it being an established rule that a tenant cannot dispute his Landlord's Title. *Cook* v. *Loxley,* 5 *J.* R. 5. *Hudson* v. *Sharpe,* 10 East, 352. [No. 40286, D, C. *Colombo.*

December 5, (C.)

912.—*Saiboe Marikar* v. *Mira Lebbe.*

Petition of Appeal: irregularity.

Where a Petition of Appeal was not taken down by the Secretary of the District Court "from the mouth of the party," in the manner prescribed by the 2nd clause of the general Rules of the 12th December 1843, the Supreme Court rejected the Appeal for irregularity. [No. 12411, D. C. *Chilaw and Putlam.*

Dec. 16, (O. C. S.)

913.—*Tambapulle* v. *Sanawiere.*

Opposition was made to Provisional Judgment being granted in this case, on the following grounds:—

1. That the Libel and Summons were not so framed, as to entitle the plaintiff to Provisional Judgment.

2. That the account rendered and signed by the defendant was not a liquid instrument—figures were erased and others substituted : in which case provision ought not to have been granted. Wassemar, *Jud. Pract.* p. 129. Sande, *Book* 1. tit. 8. defin 3. Mascardus, *Concl.* 1261

3. That the document was an obligation, and could not have been received in evidence, not being duly stamped ; and that if no obligation provision could not be granted on it.

4. That the large item in the account (as asserted in the affidavit of a third party) which made up the whole balance against the defendant, had been settled by another adjustment or agreement, and should not have figured in the account at all.

Judgment. 1. The Libel states in substance that the action arises upon promises of the defendant unperformed, and narrates that the defendant on a certain day accounted with the plaintiff for moneys then due by him to the plaintiff ; that a balance of £259. 12. was found due, which the defendant promised to pay on request ; that the defendant has not paid though requested ; and prays condemnation in the sum. The Libel than calls on the defendant to confess or deny his signature "to the account hereunto annexed, marked Lr. A, and to show cause why he should not be condemned provisionally to pay to the plaintiff the said sum of £259. 12. with legal interest thereon from the institution of this suit until payment in full." The Summons requires the defendant to appear and answer to the claim of the plaintiff for the sum of £259. 12. due upon an account dated 10th August 1842. The answer makes no objection to the Libel as being informal, or as not stating the cause of action with sufficient precision; nor does it object that the Summons is at variance with the Libel as regards the cause of action ; but

pleads that the first item in the account due by the defendant was included in another account, made by the plaintiff, defendant, and other parties, their partners, and which he, the defendant, has settled, and that it was by mistake included in the account between the plaintiff and the defendant. The plaintiff in his Replication denies the Answer. The defendant admits his handwriting, and puts in an affidavit of a third party supporting his Answer. The Rule of Court which relates to the form of Libels, simply requires that the Libel shall state the cause of action or complaint, as shortly as the nature of the case will admit, and the relief or remedy which the plaintiff seeks. Certainly the plaintiff has not strictly complied with the rule. He has not contented himself with stating that the defendant was indebted to him, accounted with him, and admitted a balance, and prayed that he, the defendant, might be condemned to pay the same; but has unnecessarily stated that the defendant promised to pay the balance, and has stated such promise to be his cause of action. At the same time the defendant may have made such promise, and such promise is, if proved, only additional evidence of the defendant's liability upon a prior obligation. The Court will not turn a plaintiff round because his pleader uses words in the commencement of his Libel which have a technical meaning in English pleading, but which convey no precise meaning to any person unacquainted with that mode of pleading. The Court will reject as surplusage all that is said in the Libel which has an aspect towards the English action of assumpsit, and let the Libel stand upon the liability of the defendant to pay that which was found and admitted to be due from him on an account taken. And in this view of the case no objection can be made to the Summons which agrees with the essential part of the Libel. The Court comes to this conclusion more readily, as the Answer shows that the confusion in the Libel has wrought

Courts may reject surplusage in a Libel.

no injury to the defendant in any way. As to that part of the Libel which prays for Provisional condemnation, the Court is of opinion that the "said sum of £259. 12s." must be taken to relate to that very sum mentioned in the former part of the Libel which upon taking the account was found to be due from the defendant to the plaintiff, and that the account Lr. A. is to be one and the same accounting, as the defendant does not deny in his Answer that it is so. The Court, therefore, holds that the first objection is not valid.

2. The Court on comparing all the authorities which treat of this point, comes to the conclusion that a *vitium* or defect, whether blot, tearing of the paper, erasure, interlineation or the like, must be of considerable consequence, and impress the mind of the Judge with a suspicion with reference to the important parts of the document. In the account in question there are two erasures, neither of which occur in the debit side of the account embracing the items which express the causes of the debit; nor in the credit side of the account containing the items of discharge, but a palpable *error calculi* had been made in the summing up of the credit side, and which necessarily occasioned a corresponding error in the balance. These two errors were corrected, the figures, which correct addition and subtraction required, being written over the erroneous ones. Is this a defect of great consequence? Does it impress the mind of the Judge that the Defendant is called upon to pay anything more than he admitted to be due? Does it lay the plaintiff under any imputation of fraud? Will it subserve the ends of Equity (on which the whole system ot Provisional Judgment is based) to turn the plaintiff round for miscomputation which can injure no one? The Court thinks not, and that the error is not material. The Court is further of opinion that the document contains the *causâ debiti*, as expressed in every item of the debit side of the account. It may be

Vitium or defect in a document must be great and induce suspicion.

Whole system of Provisional Judgments is based on Equity.

further said that the writing is not in the form and terms commonly employed in an obligatory instrument, and may therefore have been made as a memorandum for private use only, but, as it is produced by the creditor therein, it must be presumed to have been intended to have been delivered; and moreover, by the Answer it is admitted to be an account stated between the plaintiff and the defendant.

3. The Court is of opinion that the document in question cannot be called an obligation, it is an admission of what is due by the debtor at a certain date, upon a former obligation or obligations existing between himself and his creditor. The items in the accounts show a diversity of obligations: some may have been written contracts, others verbal agreements. But a mutual obligation lay on both parties to perform these obligations, totally independent of this document, which was not meant to abrogate them, and come in their place; but is merely an admission by the defendant that, at the date, the parties stood in such a position as to debit and credit upon their respective obligations. There is no word in the Stamp Act requiring a stamp on an account stated, nor on any document similar to the present.* This account therefore does not require a stamp, and so is admissible evidence. But it is said a provisional claim can only be founded on an obligation, or on a Merchant's accounts. The text books hold no such doctrine, unless where, sometimes, the word 'obligation' is solely used as being the class on which provisions are most usually granted; but it is clear that any other instrument signed by the debtor is sufficient. The appendix to the Law Dictionary expressly uses the words—" an acknowledgment of the party." A receipt signed by the creditor is sufficient to prevent provision. A receipt is an admission of money paid. Surely an admission of money due should fall under the same rule.

Provision may be granted on any instrument signed by the debtor.

* Nor is there in the present Stamp Ordinance, (No. 11 of 1861.) *Ed.*

4. The writers on the Roman Dutch-Law are much divided on the admissibility of such evidence, and amongst those against it is *Voet*. The weight of authorities seem nearly equally balanced. Perhaps the sounder principle is to permit no other species of evidence in opposition to a Provisional Judgment, which is not allowed in support of it; and, if we consider the facility with which affidavits can be procured in this Island, in support of any falsehood however gross, expediency demands the rejection of parol testimony; and the Court, feeling itself at liberty under the authorities to reject affidavits altogether, will do so at least when not more conclusive, and supported by stronger concurrent circumstanoes which carry a convicton of their truth to the mind. than occurs in the present instance. [No. 36701, D. C. *Colombo*.

914.—*Dec.* 18, (O. C. S.)

Motosamy Chetty and another, attorneys of *Peria Carpen.*

v.

Mohamedo Lebbe.

Where a Bond was granted to A. who admitted at the trial that the money was due to him and his partners, *held* that he alone could sue.

The plaintiffs in this case brought their action as attorneys of *Peria Carpen Chetty*, to recover the balance unpaid on a Bond granted by the defendant to *Peria Carpen Chetty*. The defendant pleaded the general issue. On the examination of *Peria Carpen Chetty* (allowed by the rule of Court) he admitted that he was a partner with two others, and that the money due on the Bond belonged to him and his other partners. The defendant's counsel moved that the plaintiff be nonsuited,—*First*, because the plaintiff's had only a Power of Attorney from *Peria Carpen Chetty*, and not also from the other partners. *Secondly* because the action should have been brought by *Peria Carpen Chetty* jointly with his two partners. The District Court refused to nonsuit the plaintiffs, and after hearing the case on its merits gave judgment for plaintiff. The defendant appealed on the grounds abovementioned, and the Supreme Court affirmed the judgment, subject to the opinion of the Court sitting in general Sessions, whether the action were rightly laid. *Voet, lib.* 17, tit. 2, sect. 16, and herewith agrees the Law of England. 4 B. and C. 664. 10 B. and C. 2o and 4 B. and A. 437, in which case the Court said, " the action may be maintained either in the name of the person with whom the contract was actually made, or in the name of the parties really interested. Judgment *Affirmed.* [No. 12496, D. C. *Chilaw.*

915.—*Meera Pulle* v. *Odomen Pulle.*

The question in this case was whether the old writing tendered in evidence must be stamped, as coming under description of instruments specified in the 2nd cl. of the 2nd section of the Ordinance No. 6, of 1836, or whether it sdoe

not require a stamp as being included in the exemptions in table C. under the 5th cl. of the 2nd section. "The Ordinance is closely taken from the English Stamp Act. 55 Geo. iii. ch. 184, and the technical terms used in that act, and proper to the English Law, are used. The Court must, therefore, understand and construe these terms as they are understood and construed in England. And the Court is of opinion that the deed would be held by the English Law, not as purporting to transfer or make over the property therein referred to, as it wants the technical words of transfer, and would be deemed to be a contract or agreement; and, as in this case, being for the sale of cattle, would by the same law fall under the first exemption in table C. It is therefore decreed that the Judgment of the Court below be *set aside*, and that the ola be admitted in evidence." [No. 9855, C. R. *Batticaloa.*

Where an Ordinance is modelled after an English Act, the Court must construe the terms as they are construed in England.

Dec. 23, (C.)

916.—*Abeyewardene* v. *Madoma.*

Where plaintiff's bond gives him a mortgage of a share of a field in lieu of interest, and the plaintiff has, accordingly, thereunder possessed such share ever since, *held*, that the bond is not prescribed, and the plaintiff may, notwithstanding the lapse of time, recover thereon in a suit in the District Court, if he be advised to institute the same. [No, 526, C. R. *Galle.* (See Morgan's *Digest*, p. 2, and Beling's *Digest*, p. 281, and Appendix C.)

Contract of *Antichresis.* Mortgagee may recover notwithstanding plea of prescription.

Dec. 24, (O. C. S.)

917—*Mulkadoowawe* v. *Rang Ettena.*

In this case A. claimed a chena land situate within the Kandyan Provinces from B. The District Court non-suited the plaintiff who admitted that he neither held Sannas, nor grant of any kind, and that no taxes or services had been paid or rendered for the same, conceiving that he was bound so to do under the 6th cl. of the Ord. No. 12 of 1840.

In *Ord*: 12 of 1840, the words "Private party claiming against the Crown" refer only to suits in which the Crown is a party. *C. J. dissentiente.*

The Court is of opinion that the words in that clause "All chenas &c. in the Kandyan Provinces shall be deemed to belong to the Crown, and not to be the property of any *private person claiming the same against the Crown;*" refer only to suits in which the Crown is a party ; and such not being the case in the present action, the judgment must be set aside, and the case remanded to the District Court to be proceeded with.

"The Chief Justice doubting however, because, although the above reading is the most plain and obvious meaning of the words in question, still they will bear another more in accordance with the other parts of the 6th clause, viz: that "claiming the same against the Crown" need not be confined to suits in which the Crown is a party, inasmuch as all lands in the Kandyan Provinces belonged to the King, unless a grant or services were proved, and, therefore, in all cases there must be virtual claim against the Crown, the original proprietor of all lands. And because, if the words are not taken in this last acceptation, chena land in the Maritime Provinces are generally in all suits, at all times, in all places, to be presumed the property of the Crown, and, in the Kandyan Provinces, are to be deemed to belong to the Crown only in a suit between the Crown and a private party which it can hardly be supposed was intended by the Legislature; and further in reference to the 11th section, it might happen that, a chena land in the Kandyan Provinces, might, in a suit between two private parties, be decided upon a ten years prescriptive title to belong to one of them, and a Headman present in Court, and who heard evidence of an encroachment, would be liable to a fine, if he did not inform the Government Agent of such encroachment. In all probability the words "and not to be the property of any private person claiming the same against the Crown" have crept into the Ordinance *per incuriam.* If we

reject them the whole of the parts of the 6th clause are brought into accordance with each other.

The judgment of the Court below was *set aside*, and the case remanded to the District Court to be duly proceeded with. [No. 10277, D. C. *Kornegalle.*

February 4, 1846, (S,)

918—*Wedda* v. *Balea.*

Kandyan Law of Adoption.

The local law applicable to this case is contained in the following words of Mr. Sawer in his Kandyan Laws. p. 26.

" A regular adoption must be publicly declared and acknowledged, and it must have been declared and generally understood that such child was to be an heir of the adopting parent's estate.

Adopting parent and adopted child must be of the same caste.

" The adopted child must be of the same caste as the adopting parent, otherwise the adopted child cannot inherit the hereditary property of the parent.

Adoption must be openly avowed.

" A child being reared in a family, even if a near relative, is not to be construed into a regular adoption, without its having been openly avowed and clearly understood that the child was adopted on purpose to inherit the property. [No. 3569, D. C. *Ratnapoora.* (See *ante* 14th January 1843.)

July 6, (C. S. T.)

The Hon'ble WILLIAM OGLE CARR was sworn in as *Acting Chief Justice.*

The Hon'ble JAMES STAKK was sworn in as *Acting Senior Puisne Justice.*

The Hon'ble CHRISTOPHER TEMPLE was sworn in as *Acting Junior Puisne Justice.*

August, 14, (S.).

919.—*Candappa* v. *Vanderstraaten.*.

Proctors must bestow proper

The Supreme Court was of opinion in this case that there was, on the part of the defend-

care and diligence in their clients' business.

ant, a culpable want of care and diligence in ascertaining the real facts of the case, in which he was employed by the plaintiff, and in preparing the evidence, pleadings, and appeal.

"It is of the greatest consequence to the character of the profession, the safety of the parties, and the due administration of justice to require of and from all Proctors, proper care in the business entrusted to them by their clients, and more especially in cases where the clients are ignorant and illiterate; and to afford full redress to injured parties, where any Proctor is deficient in requisite care. In this respect, however, this is the first case of the kind here, and the damages are modified." [No. 34826, D. C. *Colombo*.

Aug. 15, (S.)

920.—*Don Philip* v. *Silva*.

Lotteries illegal if prohibited.

Where money was paid in a lottery transaction, *held*, that lotteries and gaming in general, not being against morals or the public peace, are not *mala in se*, but illegal only if prohibited; and that, as no such prohibitions existed at the time,* the money is recoverable at Law. [No. 40609, D. C. *Colombo*.

921.—*Don Juan* v. *Fernando*.

Notice of entry of a case in Trial Roll must be given to the opposite party.

Notice of the entry of a case in the trial-roll must be given to the opposite party, as required by the General Rules and Orders of 8th July 1842. [No. 29419, D. C. *Colombo*.

Aug. 19, (S.)

922.—*Thompson* v. *Staples*.

A Deed properly stamp-

If a deed or instrument subject to stamp duty bears the proper stamp, it is admissible

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* But see Ordinance No. 8 of 1844 (*For the Suppres- of Lotteries*) where lotteries are declared to be "common nuisances and against law" "Cheetoo" playing, has been declared as coming under this Ordinance. See No. 18859 (*C. R. Colombo* Judgment *per* C. H. de Saram) *Affirmed*. (See Appendix) ED,

notwithstanding its not having been stamped at the time of execution, nor lodged within three days with the Government Agent, in order to its being stamped; there being, as the Court thought, no prohibition, either direct or by construction, excluding deeds or instruments on these grounds. [No. 41469, D. C. *Colombo.*

ed admissible altho' it was not stamped at the time of the execution.

Nov. 3, (S.)

923.—*Mohanderameley Punchy* v. *Demiawa Hamy.*

The rule *pendente lite nihil innovetur* has not the effect of rendering deeds executed void, but only of retaining the rights of parties in the same situation as they previously were. [No. 4390, D. C. *Ratnapoora.*

Interpretation of Rule, *pendente lite nihil innovetur.*

March 20th (C.)

1847

924.—*Rama Aya* v. *Rama Pulle.*

Affirmed:—"The Proctor signing the appeal is disallowed his costs thereof, as this Court considers it vexatious, as it states no ground for appeal, excepting the illness of the Proctor, and the defendant's witnesses not having been heard; but the defendant's advocate was present, and ought to have examined the witnesses or shewn cause to the satisfaction of the District Court for a postmonement, and for which he was allowed two consecutive days." [No. 95, D. C. *Colombo* (see *Murray*, p. 77.)

Vexations Appeal. Proctor disallowed his Costs.

925.—*Canapady Ayer* v. *Seyedoo Oemma* and *others.*

Action on a Bond dated 30th March 1846 granted to plaintiff by husband, (since deceased,) of the 1st defendant, payable on the 30th September 1846, with interest. Obligor died on the 7th April; *averment* that 1st defendant took possession of all his property, and thus rendered herself liable for his debts. Action instituted 27th June 1846. *Demurrer* by third

1. Action not maintainable against widow of deceased obligor, until the period for payment, stipulated in

the Bond has expired.
2. A cautionary obligation is not binding unless it be in writing and signed by the obligor, or by a person authorized by him. (*Ord.* 7. of 1840 *cl.*21.)

defendant, on the ground, (*inter alia*) that Bond was put in suit before it was due,

D. J. held demurrer good, and on the 11th Sept. 1846, nonsuited the plaintiff.

March 20, 1847.—In appeal, (per *Carr* A. C. J.) "*affirmed* with costs—the action having been brought before the money was repayable under the Bond; the defendants could not under the Ordinance 7. of 1840, cl. 12. be charged for the debt default or miscarriage of another, except by some promise or agreement in writing signed by them, or by some person thereto lawfully authorized by them, which is not averred." [No. 2298 D. C. *Colombo* (See *Murray's Reports* p. 78.)

926.- *Cardoes* v. *Annavy*.

Suits by native Traders: most clear and unexceptionable evidence requisite, in proof of parol admissions and promises to pay.

" The Supreme Court has always held, in suits by native traders, where they have omitted to take receipts on delivery of the goods, or to require their debtors to sign the balance of the account, but rest their demand solely on proof of the debtor's parol admission and promise to pay the balance stated to be due, that the most clear and unexceptionable evidence thereof must be adduced, or otherwise this Court will nonsuit the plaintiff. [No. 10618, D. C. *Colombo*. (See *Murray's Reports*, p. 79.)

March 23, (C.)

927.—*Ratnapalle* v. *Senewaratne*.

Reception of documents tendered in evidence.

A document tendered in evidence by the plaintiff ought not to be rejected, 1st, because it was not referred to in the pleadings,—the rule requiring all documents, referred to in the pleadings, or copies thereof, to be filed therewith, not extending to or excluding it; 2ndly because the document being deposited in a public registry, it might be safely received without any suspicion attaching to it from improper custody or detention. [No. 18918, D. C. *Kandy*.

928.—*Collier* v. *Teagappa Chetty*.

[See appendix for full report—(No. 38134, D. C. *Colombo*.)]

929.—*Livera* (widow) v. *Pieris*.

[See appendix for full report—(No. 11176 D. C. *Negombo*.)]

March 25. (6.)

930.—*Fernando*. v. *Fonseka*.

One party, a defendant, cannot file pleadings signed only by himself, for his co-defendant, and himself.

Where defendants, father and son, entered into a joint contract, and the first defendant put in an answer in the name of both, though signed only by himself, and on this apparently joint, but defective, answer, issue was joined, and the case proceeded to trial, the Supreme Court remanded the case back for the second defendant to enter appearance, and for an amended answer to be put in by the defendants, with their lists of witnesses, and for the Court to decide the case *de novo*. " The Plaintiff is in error [in joining issue] but his mistake has been occasioned by the wrong act, of the opposite party, and costs are therefore divided. [No. 38,170, D. C. *Colombo*, (See *Murray's Rep*. p. 81.)

931.—*Fernando* v, *Walker* (Deputy Fiscal) and another.

(1.) A *Deputy Fiscal*, not being the immediate wrong-doer, is not responsible for the acts of his subordinate Fiscal Officer. (2.) A Fiscal's Officer seizing property in execution though pointed out by the creditor,

Action to recover from defendants the value of certain timber alleged to have been property of plaintiff, which was sold by defendants under a writ of execution against a third party. The defendants were the *Deputy Fiscal* of the District and a subordinate officer who conducted the sale. *Averment*, that plaintiff claimed timber, opposed the sale, and offered " sufficient securities," but defendants sold the timber notwithstanding Defendants, traversing averments, pleaded that they seized the timber on its being pointed out as the property of the execution debtor. At the trial the plaintiff admitted that the seizure was made on the timber being poin-

may yet be liable in damages for malice, irregularity of proceeding, or abuse of authority. (*Ord* No. 1, of 1839, *Cl.* 12.)

ted out as the property of the execution debtor. In the Court below the action was dismissed as against the 1st defendant because he was not an *immediate* wrong-doer, and as against the 2nd defendant because plaintiff admitted that the seizure was made on the execution-creditor pointing out the property.

IN APPEAL: *Affirmed* as to dismissal regarding the first defendant; but *set aside* with costs as regards the second defendant, against whom the D. C. ought to proceed to hear evidence, and give judgment *de novo*. "The admission of the plaintiff that the timber in question was seized by the defendant on its being pointed out to him by the party by whom the writ of execution was issued will not discharge the liability of the second defendant, against whom the plaintiff may still prove malice or irregularity of proceeding and abuse of authority, in refusing to receive from plaintiff his statement in writing of his claim, and sufficient security, or not staying seizure or sale thereon." [*D. C. Colombo* No. 38370. (See *Murray*, p 82 for full report.)

Action maintainable for deposit, without tendering conveyance, on a bad title being produced.

932.—*Don Philip* v. *Dabrera.*

"The plaintiff was entitled to maintain an action for the deposit on a bad title being produced, without tendering a Conveyance, although he was required to prepare a Conveyance. *Seward* v. *Wilcock*, 5 East 189. *Loundes* v. *Bray*, 1810. Sug, *Vendors*, 233, 8th ed. And as it appears that defendants have failed to adduce a good title, although they got the original deeds back from the plaintiff for instituting actions against the claimants, which are abandoned, the plaintiff ought to have instituted his action in the above form for the recovery of the deposit, whereas by his amended Libel he seeks to compel the specific performance of the contract without any express prayer in the alternative for the defendants being decreed to repay the deposits, and it is only under the general prayer for relief that the Court can now

Decree, granting redress under

grant him the above redress upon the facts appearing in the statements of the parties in their pleadings and examination, and in the evidence, to warrant such a decree." [No. 10826, D. C *Colombo.* (See *Murray's Reports.* p 87.)

general prayer for relief.

March 30, (C.)

933—*Fernando* v. *Fernando.*

A preliminary objection was taken by the appellant's counsel, that the parties proceeded to trial and examined witnesses without any Replication. The Supreme Court thought the objection came too late from the defendants. On reference to Mitford's *Eq. Plead.* p p. 252 and 257, and Mad. *Ch. Pr.* vol. 2, pp. 451 and 453, it is said,—" A further answer is in every respect similar to, and indeed is considered as forming part of, the first Answer ;" and " where by mistake a Replication had not been filed, and yet witnesses had been examined, the Court permitted the Replication to be filed *nunc pro tunc.*" *Blagden* v. *Cramlington,* 16. Nov. 1787. *Mosely* 296.—[No. 10442, D. C. *Colombo.*

Objection to examination of witnesses before Replication is filed, should be made at the trial in Court below.

April 17, (*C.*)

934—In re *Pahalewatte Mohotalle.*

Dingiry Hamy v. *Lokoo Ettena.*

Where the appointment of Executor fails by the sole Executor appointed in the Will dying before Probate, the Will is to be similarly proved as though Probate were taken of it by the executors, and administration with the Will annexed granted to the residuary legatee, or person entitled to the greatest interest under the Will, who is preferred to the next of kin ; and the representative of the residuary legatee has in such cases the same right to administration. As the next of kin, however, has a *primâ facie* right, the burthen of proof lies on the party claiming derivatively from a residuary

Mode of procedure where sole Executor dies before *Probate.* Residuary legatee preferred. Next of kin, however, having *primâ facie* right, proof lies on other party.

legatee &c. See Williams *On Executors*, 285. —[No. 85, D. C. *Ratnapoora*.

October 30, (*T*.)

935—*Setappa Chetty* v. *Perera*.

Non-service of notice of Trial. Appearance of defendant in Court, notwithstanding.

"The decision of the District Court to hear this case *ex parte*, was founded upon the supposition that the defendant had had sufficient notice of the trial; but this, on reference to the record does not appear to have been the case, no notice having been given to the defendant of the day on which the trial was to take place. The appearance of the defendant on the day of trial, and his having cross-examined the plaintiff's witnesses is, in strictness, a waiver of the want of notice. But as the defendant had no Proctor to advise him, the Supreme Court considers he should not be precluded from making his defence, but he must pay for the indulgence granted him."—[No. 3142, D. C. *Colombo*.

Nov. 2, (S.)

936.—*Read, Davidson & Co.* v. *Cripps*.

This was *affirmed* subject to the opinion of the Judges Collectively on the following points :—

1. Whether there was any default on the part of the defendant in not delivering the goods to the plaintiff; if so,

2. Was such default within time of prescription with reference to the *Ord*. No. 8 of 1834, sect. 9.

3. Is the Notice of Action, of date 29th May 1843 sufficient with reference to the *Ord*. No 1 of 1839, sect: 13.—[No. 10331. D. C. *Galle*.

Nov. 6. (*T*.)

937.—*Gabriel Naide* v. *Meganchy Naide*.

" The first point for consideration is, whether the seizure of the sheep was lawful, which

depends upon, whether the fences were in good or bad order, and which party was liable to mend them. Now in the case between the parties, under the trespass Ordinance, relative to this trespass which has been just in evidence and admitted by the defendant, the defendant admits that he did not mend his gaps because the plaintiff did not mend his. The defendant having neglected to mend his own gaps, could not expect the plaintiff to mend his; and the defendant was not therefore justified in distraining the sheep, until he had given the owner notice to remove them out, and he could only seize them, if the owner took no steps to remove them."—[No. 1609, D. C. *Colombo*.

Distraining sheep not justifiable until notice given to owner to remove them and he fails to do so.

938.—*Abeyeskere* v. *Pintoe*.

The deficiency of stamp can be supplied under the Ordinance No. 6 of 1836, cl. 9, and according to the practice which prevails in the District Court; a motion for that purpose can be made during the trial, it being in the discretion of the Court to grant such motion or not as it sees fit, upon the usual terms required by the Ordinance.—[No. 1959, D. C. *Colombo*.

Deficiency of stamp, (See *Ord* (No. 11 of 1861)

Nov. 20, (*T.*)

939.—*Dingiry Amma* v. *Dingiry Manika*.

The point in issue in this case is, whether the respondent was the wife or concubine of *Appoo Vidahn*, and it should be open to the appellant to prove that she was of lower caste, which would raise a presumption against the alleged marriage, unless the respondent could shew a due recognition of her as Appoo Vidahn's wife; and it was also competent to the appellant to shew, by other evidence, thatshe was his, Appoo Vidahn's, concubine: and, if she should be of lower caste, she would only be entitled to acquired property and not to her husband's parveny property, and in this event it would be incumbent on the respondent to prove, that the property sought by her to be recovered, is such as she

Concubine of lower caste only entitled to her husband's acquired property and not to his *parveny* property.

is entitled to.—[No. 19306, D. C. *Kandy*. (See Sawer's *Digest* p. 38.)

Nov. 24, (T.)

940.—*Wattoohamy* v. *Dingyhamy.*

English Law of *Champerty.* Where an action is founded on an instrument which is bad in law, the S. C will not interfere, if the deft, who loses on the instrument, does not raise any objection to it in the Court below, or in appeal.

In law the instrument upon which the plaintiff founds his action is illegal, and the consideration of it is what the English Law calls *champerty*, i. e. a bargain between the plaintiff and the defendant to divide the land sued for between them if they prevail at Law. Whereupon the Champertor (or the plaintiff in this case) is to supply funds to carry on the other party's suit. If the defendant had, in this case, raised an objection to the transaction, or had appealed against the decision of the District Court, this Court would have declared the whole transaction illegal. But as it is, the plaintiff appeals against the judgment of the District Court as incorrect on account of its being conditional and not decisive, and the defendant has not appealed against the decision at all, nor has any question been raised against the validity of the transaction. Under these circumstances, and considering that from anything which appears to the contrary the plaintiff *boná fide* lent the money, without having any improper or oppressive object in view, the Supreme Court does not feel justified in setting the whole transaction aside. The plaintiff, however, cannot be permitted to recover the land, but only the money which he lent to the defendant, with legal interest.—[No. 4939, D. C. *Ratnapoora.*

Nov. 30, (T.)

941—*Kiree Baba* v. *Menika.*

Ganglat proprietor.

A *Ganglat* proprietor * can change his tenants, but he can only do so in case of disobe-

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* I am indebted to Mr. *James Oorloff* of Ratnapoora, Proctor of the Supreme Court, for the following *Note*:—" During the Kandyan Government the word " *Ganglat* (*Gang*, lands, and *lat*, acquired) denoted a " proprietor of lands under a Grant from the Crown,

dience, i. e., non-performance of services. [No. 5244, D. C. *Ratnapoora*.

(*Dec.* 1, (C.)

942—*Cattamottoe* v. *Wederamian*.

Form of order correcting an error in Judgment of the Supreme Court.

The following form was used by the Supreme Court in a case where, in its judgment, the date of the decree of the Court below was wrongly described :—

"Whereas by the judgment given by this Court in the above case at *Batticaloa* on the 10th day of *August* 1846, the decree of the District Court of *Batticaloa* of the 9th day of *June* 1845 was set aside, but the date of the decree of the Court below was, by a clerical error, described in the said judgment as being of date the 9th day of *June* 1846: It is ordered that the said error be corrected, and that this order be transmitted to the said District Court, together with the said judgment so corrected." [No, 4994, D. C. *Batticaloa*.

Dec. 8, (J.)

943—*Bilindi* v, *Arooma*.

Demurrer on certain grounds, over

This was an action brought to recover land, and also some personal property, and the de-

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"but now, (i. e. since the British Grovernment) it "also includes holders of lands by right of inheritance "or purchase, or rather Estates such as *Nindegammes* "&c., to which are attached *Pangoos*, held by tenants, "under tenures of service to the lord of the soil. The "case No. 5244 *Ratnapoora*, was for some lands form- "ing the 'Uleakareya Pangoo,' which the owner of "the 'Nindegamme' gave over to the Plaintiff in the "case, to be held by him under tenure of service. "A tenant, if he persists in his refusal to perform "service after a judgment has been obtained against "him for neglect of duty, can be ejected, but only "by due course of Law. There are several rulings of "the Supreme Court on this point. The case No. "8207, D. C. *Ratnapoora*, now in appeal, will help to "give some idea of the right of a 'Nindegamme' "Proprietor." Ed.

ruled by Court below, *held* good in appeal.

fendant demurred to the Libel on the following grounds:—

1. That the date of the defendant's entry was not stated.

2. That land and personal property cannot be recovered in the same action.

3. That the Libel should more distinctly set forth the injury complained of.

The District Court over-ruled the demurrer.

The Supreme Court held the demurrer good, and the judgment of the D. C. was set aside, and plaintiff *nonsuited* with costs. [No. 11284, D. C. *Kornegalle.*

944—.*Lokoo Banda* v. *Mal Hamy.*

Party must recover on strength of his own title.

Where in an action of ejectment the plaintiffs obtained judgment on the ground that they had in evidence made out a *primâ facie* title; *Held* that this was not enough. A plaintiff must recover upon the strength of his own title. [No. 5388, D. C. *Ratnapoora.*

945—.*Manikhamy* v. *Kirry Ettena.*

In the absence of any ambiguity in its terms, a deed found valid must speak for itself.

A deed, having been found valid, must speak for itself, and the Court cannot consider what it was the parties intended to be the probable effect of it, in the absence of any ambiguity in the terms of it. [No. 4779, D. C. *Ratnapoora.*

Dec. 14, (J.)

946.—*Kirry Ettena* v. *Heteregedere Appoo.*

By the *Kandyan* Law, under which no community of goods exists, a Judgment against the husband, in a suit where the wife's title was not in issue, will not bar the wife's right

In a former case, No. 69, the defendant's father sued the husband of the present plaintiff, during coverture, for the lands which are the subject of the present action. In that suit the plaintiff's husband, (*Selappoo*) in his defence, set up a claim to the lands in his own right, and independent of his wife the present plaintiff. *Selappoo* failed in his defence, and the lands were decreed to the plaintiff in that case. In the present action the plaintiff rested her claim entirely in her own right, and independent of her husband. The defendant pleaded the former

1847

judgment in case No. 69, with other grounds of defence. After repeated judgments both in the Appellate Court, and in the Court below, the District Court found that the plaintiff had established a title by prescription; but that the former judgment was binding against the present plaintiff on the ground that, as she might have been a party to that suit, the Record was consequently in evidence against her, and in support of this position quoted 1 *Starkie*, 260.

to bring an action for the same land,

The Supreme Court thought that this was true as regards the lessor of a plaintiff in an action of ejectment, in which the defendant obtained judgment. 2 *Bac. Ab.* 616. Such judgment may at any time be given in evidence against the lessor, for the possession of his lessee is his own possession, and his own title has been in issue. But not so in this case. By the Kandyan Law there is no permanent community of goods between husband and wife, and their respective estates remain distinct from each other. The husband in the former suit claimed the land as his own, independent of his wife, and the title of the wife was in no way put in issue. The Supreme Court, therefore, considered that plaintiff was not bound by the judgment against her husband, and that she could maintain this action; and the Court agreed with the Court below that plaintiff proved a prescriptive title. The Judgment of the District Conrt was *set aside* and the plaintiff was decreed entitled to the lands. [No. $\frac{2690}{19472}$ D. C. *Kandy*.

1848.

May 30, (C.)

947.—*Pattooma Natchia* v. *Menachy*.

Where a party claims more than he is entitled to, he will get judgment only "accord-

Where the plaintiff claims his own share only, and although he demands in his libel more than he appears to be entitled to, he must recover upon it "*according to his title*." His being, therefore, entitled to less than claimed in the Libel does not render it necessary for him to

ing to his title.' amend the latter, nor form any ground for non-suit, although it may subject him in gross instances to pay costs. In *Denn* d. *Burges* v. *Purvis*, 1 *Burr.* 326, LORD MANSFIELD said,—"This is an exceedingly plain case, The rule "is undoubtedly right that the plaintiff must "recover *according to his title.* Here, she has "demanded half, snd she appears entitled to a "third, and so much she ought to recover." And this is so whether the action be brought for an undivided, or a several and divided portion; for the whole or a part. In *Abbett* v. *Skinner*, 1 *Siderf.* 229, where the declaration was for one fourth part of a fifth part, and the true title was only to one-third of one-fourth of a fifth-part, (which was only a third part of what was demanded), yet it was resolved that the verdict should be taken *according to the title*: and so if a plaintiff demands in his libel 40 acres, he may recover 20 if entitled to no more. [No, 36,718, D, C. *Colombo.*

948.—*Don David* v. *Ederemanesingem*

Notary, or attesting witness, must be called to prove a Deed. Death of Notary or illness, of attesting witness, does not dispense with legal proof.

The illness of an attesting witness, although he lies without hope of recovery, is not a sufficient ground for letting in evidence of his handwriting. *Harrison* v. *Blades*, 3 Camp. 457. Even if the Notary had been dead, it would not have been sufficient to prove his handwriting, but one of the two attesting witness ought to have been called. *Cunliffe* v. *Sefton*, 2 East 183. *McCrew* v. *Gentry*, 3 Camp. 232.—[No. 32,837 D. C. *Colombo.*

949.—*Silva* and others v. *Alwis* and others.

The Plaintiff ought to be called upon to state that he has closed his case, and the Judge

The decree of the District Court was reversed, and the case remanded back for hearing, and Judgment *de novo.*.

Per CARR C. J. The Court is the more inclined to grant this indulgence, from its former order* having been partially misunderstood; as

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* See Murray's *Reports* p, 32. ED.

it certainly held therein that the Plaintiffs must be taken to have closed their case from their conduct, though the more usual and the preferable course is to call upon the Plaintiff to state that he has closed his case, and for the Judge to make a minute of the Plaintiff having done so, in his notes of the trial. The Court also in the above order strictly confined its opinion to the points of practice, and was not called on, in any way, to express its view of the merits of the plaintiffs' case as it then stood, and certainly did not do so; but being now called upon to state its opinion on the same, it must observe, that if the plaintiffs' case rested at present solely on their being admitted to be the heirs of the two daughters of *Miguel Dias*, the original proprietor, who died some time ago and does not appear on the pleadings to be the last person seised, the Court would now require the plaintiffs to adduce further evidence of title before it ejected the defendants; but as the defendants admit that *Miguel Dias* was entitled to one fourth of the garden in dispute, and they claim the whole of that as having been possessed and inherited from him by their father *Dines Dias*, and add that his "*sisters*" (to whom the plaintiffs are the admitted heirs) "*had their portions from other lands, and so we have always possessed*," the onus is clearly thrown on the defendants to commence with their evidence, and prove the division or adverse possession by which their father thus acquired a right to his sister's share in their paternal property. Nothing is more common in this country than for the eldest son of a Native family to continue in the possession of the paternal estate, allowing his brothers and sisters their shares as required; and if he or his children set up an exclusive right against the brother's or sister's claim by inheritance to such estate, by virtue of an alleged division or partition between them or an adverse possession, giving a title by prescription, he or those claiming under him, ought clearly to be called upon to prove the same in the first instance; and any

ought to make in his notes of the Trial, a minute of the Plaintiff having done so.

Claim under a common ancestor. Division or adverse possession; burthen of proof.

other course would in the opinion of this Court be fraught with the most dangerous consequences to existing rights of the Natives in their family estates. [No. 2098, *D. C. Colombo*.*

June 2nd, (C.)

950.—*Jasundere Korale* v. *Dominguwa* and another.

Action to try disputed tenure of lands held by *Nillekarias*. Ejectment.

In this case the decree of the Court below was *affirmed* as to the damages awarded and costs of suit, but modified by so much of it as ejects the defendant, being set aside, reserving to the plaintiff his right to eject the defendant in another action, upon any fresh default by defendant to perform the due services. *Per* Carr C. J.—In these suits to try the disputed tenure of lands held by *Nillekarias*, this Court has usually been very indulgent in not ejecting in the first instance. —[*No.* 5367, *D. C. Ratnapoora*, Also *No.* 5368 *D. C. Ratnapoora*.

951.—*Balebattegodde* v. *Gamea*.

Long possession as mortgagee is not *adverse* possession.

Where the plaintiff claimed under a Deed from the defendant's father, which the defendant denied, but admitted the plaintiff's long possession only as mortgagee; *held* that this can give him no claim to prescriptive title. The plaintiff must prove his Deed, or long adverse possession against the defendant as heir.—[No. 5534, *D. C. Ratnapoora.* (See *Appendix* C.)

952.—*Appoo Naide Aadoo Lebbe*

Circumstances under which a Proctor is not bound to draw and sign a Petition of Appeal.

The proceedings are remanded back to require a fresh Petition of Appeal to be filed at the Proctor's cost. The Supreme Court cannot receive any qualified signature of a Proctor to the contents of a Petition of Appeal in the form adopted in this instance, "*Drawn by me on the*

* The facts of this case are stated at greater length in *Murray's Reports* p. 48 . Ed.

statement of the Appellant." If a Proctor considers that he cannot conscientiously, or with due regard to his professional character and respectability, sign a Petition of Appeal in the usual form, he should inform his client thereof, and that he was at liberty to get his grounds of Appeal taken down by the Secretary.—[*No.* 5311, *D. C. Ratnapoora.*

953.—*Don Andris* v. *Punchy Menika.*

Where a loan to a small amount appears to have been made, under probable circumstances, shortly before the death of the borrower, and is supported by clear parol evidence, it ought not to be viewed with the same hesitation and suspicion as a stale demand, or a debt of a large amount might fairly be, if depending solely on parol testimony without any document in support of it. [*No.* 5424, *D. C. Ratnapoora.*

A loan shortly before the death of the borrower. Parol evidence.

June 15th, (C.)

954—*De Waas v. Komaryhamy* and others.

Weg oddepalle Ratte Mahatmeya, Intervient.

In this case the Supreme Court *held* that the intervention after the Plaintiff had obtained Judgment against the Defendants was strictly irregular, but "as the parties have raised no objection on the pleadings, the case between the intervenient and Plaintiff might proceed on as an incidental suit, although in that view the intervient ought to have been called on in the first instance to adduce his evidence." [*No.* 4250/19165 *D. C. Kandy.*

An intervention after judgment is irregular. Incidental suit.

August 16th, (S.)

955—*Sahanda* and another, v. *Ellendawa* and others.

The Plaintiffs having been present on the day appointed for the hearing of this cause,

The Defendants cannot

be absolved on the day of hearing, when the Plaintiffs are present.

there is no authority under the Rules of Court in support of the judgment of *absolviter* entered in this case. It is only where the Plaintiff and his witnesses are absent, that such judgment can be given; but in this case not only were the Plaintiffs present, but they had also duly subpœned their witnesses, who failed to attend. [No. 5540, *D. C. Ratnapoora.*

September 25th.

[The Hon'ble James Stark Esquire was sworn in as *Acting Senior Puisne Justice.*]

[The Hon'ble Christopher Temple Esquire was sworn in as *Acting Junior Puisne Justice.*]

1849.—*February* 2, (O.)

956.—*Kande Unanse* v. *Waulpenne Unanse.*

It is no objection to a Libel that all the documentary evidence mentioned in it is not filed. The Libel has nothing to do with the evidence which is to support it. [No. 5316, D. C. *Ratnapoora.*

Documentary evidence mentioned in Libel need not all be filled.

957.—*Aratchely* v. *Baleappoo.*

"The deed being more than thirty years old does not require to be proved by the subscribing witnesses. The Court and assessors must pronounce upon its authenticity in the best manner they can, but it must not be thrown aside because not proved by the witnesses to it." [No. 5709, D. C. *Ratnapoora.*

Deed thirty years old need not be proved. It must not be rejected because proof was offered and failed.

May 26, (O.)

958.—*Candoo Natchia* v. *Sinnewen.*

Where through the misunderstanding of a Proctor, the defendant was not in a position to go to trial, the Supreme Court ordered the Proctor to pay the costs of trial in the Court below, and in Appeal. [No. 37601, D. C. *Colombo.*

Payment of Costs by Proctor.

September 11, (O.)

959.—*Perera* v. *Don Philipoo.*

"The plaintiff's notarial Deed, which as such is entitled to the greatest faith, is the prop of his case, but there are circumstances connected with it, which, until explained, weaken the dependence to which otherwise it would be entitled. The plaintiff's name is *Perera* the Notary's name is *Perera*, and so is that of both the witnesses. One witness appears to be dead; but the living witness gives such an account of what took place when the deed was executed, as contrasted with what is said by the Notary, that it makes one doubt his having been there. It is desirable that these two witnesses should be examined by those well practised in the art of eliciting the truth; that the odd coincidence

Certain circumstances in connection with a Notarial Deed, which, in the opinion of the Supreme Court, required explanation.

of so many *Pereras* being in the transaction should be explained, and that the Notary's protocal should be carefully examined (if it be admissible evidence.)" [No. 2849, D. C. *Colombo.*

October 24, (S.)

960.—*Perera* v. *Swaris.*

This was an action brought to set aside the defendant's opposition to a sale of certain property under a Writ of Execution. The defendant claimed the property in question by purchase from *Andris Fernando,* as administrator of *David Fernando,* to which latter the property was admitted by all parties to have belonged. But the plaintiff denied *Andris Fernando* to be such administrator, and alleged that the property passed on *David Fernando's* death to his mother (*Maria Peris,* widow of *Gabriel Fernando,*) his sister (*Isabella Fernando*) and his brother (*Andris Fernando.*) It further appeared from the defendant's own admission, (1.) that the sale to him by *Andris Fernando* was a private sale, not a sale by public auction: and (2.) that he never got possession of the premises.

Judgment was given by the District Court, that the defendant be quieted in the possession of the premises, and that the plaintiff's claim be dismissed with costs.

On the hearing of the Appeal for the plaintiff, the following questions arose :—

1st. Whether the plaintiff's admission in his examination, that Letters of Administration were taken out shortly after *David Fernando's* death by his brother, (*Andris Fernando,*) was sufficient legal proof of such administration having been granted. The plaintiff contended *not,* relying on the cases in 4 *East,* 53 ; 1 *Bingh.* 73 ; *Dougl.* 216 ; but see. Roscoe *On Evid.* p. p. 38 and 40.

2nd. Whether a private sale by an administrator, as in the present case, is valid and effec-

nal. The plaintiff contended *not*, and questioned the Collective decision in the case *Chilaw and Putlam* No, 4416, which was followed in D. C. *Colombo* No. 986, July 5, 1847.

3rd. Whether any sale could be effected in this case, without the consent of the heirs of the deceased.

4th. Whether possession of the premises was acquired by the defendant, and if not, what is the consequence of such want of possession in reference to the deed of sale in his favor ; and

5th. Whether any consideration was given for the sale, and if not, what is the effect of this in the tranaction. *Cur. adv. vult.* [No. 2496, D. C. *Colombo*.

December 5, (O.)

961.—*Awuker Lebbe* v. *Mamel Tamby.*

Procedure, where one of two or more Plaintiffs dies after Judgment and before execution.

If after judgment and before execution one of two or more plaintiffs dies, the survivors may take out execution in the names of all the plaintiffs ; or, if they please, may suggest the death of one of them on the record, and take out execution in the name of the survivors. [No. 2054, D. C. *Manaar*.

Dec. 7, (O.)

962.—*Mudelitamby* v. *Aratchille.*

Grantee of Land *donatio intervivos* who has entered into possession may maintain an action against a trespasser.

" The grant of the land is a *donatio intervivos*, to take effect *de presenti*, and the lands are thereby given for certain purposes beneficial to the grantor, and the grantee who has entered into possession has a right of action against any person molesting him therein."—[No. 10741, D. C. *Kornegalle*.

February 2, 1850. (O.)

1850

963.—*Gillemalle* v. *Gittemulle.*

Plaintiff in a former suit not an incompetent wit-

The witness who was rejected because he was a plaintiff in the former suit is not necessarily disqualified, and the District Court is referred

ness in a subsequent suit.

to Roscoe *On Evid.* edition 6, p. 636; and 6 and 7 Vict: ch. 5, as to what interest shall no longer disqualify. [No. 5905, D. C. *Ratnapoora.*

February 22, (O.)

964.—*Morogaser Pulle* v. *Collanda*.

A Counsel may state in his speech matter which he may not be allowed to prove. Time to try the question.

The Supreme Court will not enter into the point irregularly taken by the District Court. A counsel may state that he will prove a matter which he may not be allowed to prove as objectionable by being irrelevant, or incompetent evidence; but the time to to try the question, is when a witness is in the box, and an irrelevant or incompetent question is put to him.—No. 1262, D. C. *Colombo*.

November 30. (T.)

965.—*Fernando* v. *Silva*.

Rights and liabilities of Vendee and Vendor.

The issue between the parties is whether the defendants put plaintiff in possession of the lands in dispute. If a free and exclusive possession has not been given, the vendee has a right to demand it, or the return of the purchase-money. "The purchaser by force of "the contract acquires the right to demand and "receive, and the vendor incurs the obligation "of making to him the tradition or actual de-"livery of the property if it be corporeal." 2 *Burge*, 537. [No. 10823, D. C. *Colombo.*

966.—*Balebatgodde* v. *Gamea*.

Course to be adopted if a party to a suit dies pending action.

The order of the District Court was *set aside* and the case was remanded to be proceeded with. "The District Court appears (by the order made on the 22nd November 1849) to have recognized the heirs of the deceased plaintiff as parties to the suit. The correct course

would have been for the District Court upon their application to have revived the suit in their name, and made them parties-plaintiffs on the record. [No. 5534, D. C. *Ratnapoora.*

December 7, (T.)

967.—*Supermanien Chetty*, Agent of *Satappa Chetty* v. *Goonamotto Sopia.*

The Supreme Court considers that the plaintiff in this case does sue on his own behalf, and that the calling himself "*Agent*" in the heading of the libel is but description and surplusage; and the Supreme Court further considers that though he has partners he may sue in his own name, 2 Williams *On Executors*, 1470 and cases there cited; *Lloyd* v. *Archhowle*, 2 Taunton, 324; *Skinner* v. *Stocks*, 4 B. and A. 437; *Kell* v. *Namby*, 10 B. and C. 21; *Garrell* v. *Handley*, 4 B. and C. 666; Collyer *On Partnership, p.* 464. [No, 9145. D. C. *Colombo.*

December 9, (T.)

968.—*John Black* v. *Trivett.*

This case was called on for trial, when the plaintiff moved for a postponement on two grounds,—1st the absence of his Advocate; 2ndly the absense of a material witness. This application was overruled by the District Court, The plaintiff thereupon declined going on with his case, or to permit the defendant to call his evidence, upon which the District Court nonsuited the plaintiff.

S. C. will not interfere with the ruling of D.C.on a question of postponement.

Judgment.] The Supreme Court declines, in this case, to interfere with the ruling of the District Court as regards the postponement, such being a matter in which the District Court should be left to its own discretion. The Plaintiff had no right to oppose the defence being gone into, if, under the circumstances, and

the issues taken, the onus of the proof rested with the defendant. [No. 6868, D. C. *Colombo.*

1851

1851.—*February* 3, (O.)

969.—*Wille* v. *Vellanen Chetty.*

Service of notice of judgment.

Service of Notice to shew cause why judgment should not be entered is not proved, which ought to have been done before judgment could have been given. [No. 5895, D. C. *Ratnapoora.*

February 5, (O.)

970.—*Egoddewatte* v. *Kahatawatte.*

Case remanded to prove damages.

The District Court has given damages without any proof of the amount having been given. The case is therefore remanded to give the plaintiffs an opportunity of proving their damage. [No. 6120, D. C. *Ratnapoora.*

971.—*Mahamadoe* v. *Nonis.*

Acknowledgment of a loan may be read in evidence *per se*, and surplusage in the instrument rejected.

The Supreme Court is of opinion that the instrument not admitted in evidence is an acknowledgment of a loan, with an agreement added as to how repayment is to be made. That the acknowledgment of the loan requires no receipt or other stamp, and may be read in evidence *per se* irrespective of the remainder of the document, and whether such remainder requires a stamp or not. [No. 3367, D. C. *Colombo.*

972.—*Kalohamy* v. *Kirrehamy*

The decree in this case was *set aside* as there was no proof recorded that Notice of Trial was given to plaintiff. [No. 5987, D. C. *Ratnapoora.*

August 16, (C.)

973.—*Ketanhamy* v. *Gamea.*

This case was *affirmed* as a non-suit. "The witnesses are very unsatisfactory to prove the plaintiffs possession under the alleged old deed of purchase which is filed, or any possession ad-

verse to the defendant's claim as mortgagor. The facts alleged in the defence by the answer, as to the tenure of the lands under the Saffragam Dewale, and that defendants had continued to perform the services due thereto as tom-tom-beaters, to which caste plaintiffs do not belong, and also that the land appears as the defendant's in the Commutation and Temple register, are not particularly denied in the Replication, but alleged to be irrelevant points, whereas they are most material and important in considering whether the plaintiffs have held only as mortgagees. See Marshall's *Judgts* 361,382. [No. 5534 D. C. *Ratnapoora.*

Tenure of Temple Lands. Performance of Services.

August 19, (C.)

974.—*Combe Hamy* v. *Lekam.*
Gerra Ettena intervenient.

The widow of a husband dying *childless* has the same life interest, and that only in her husband's landed property, whether hereditary or acquired, as the widow of a husband who has died leaving issue. See Sawer's *Digest*, p. 63. Where a deceased had left near relatives, as nephews, his childless widow has only been held entitled to such life interest. See Armour's *Digest* p. 19, 21.

Kandyan Law. Widow entitled to same life interest in husband's landed property, whether he left issue or not.

An intervenient having joined a suit after the plaintiff's Replication to defendant's Answer had been filed, was bound to take up the suit in the stage in which he found it, and no further pleadings therefore ought to have been allowed. [No. 5951, D. C. *Ratnapoora.*

Intervenient bound to take up a suit in the stage in which he finds it.

975.—*Wijeyekoon* v. *Dalpedado.*

Held, that documents filed by the plaintiff, referred to in his Replication, and made part of his case on the pleadings, could not be disproved by himself by calling evidence. [No. 6136, D. C. *Ratnapoora.*

Documents filed by Plaintiff cannot be disproved by himself calling evidence.

1852.—*October* 20, (O.)

976.—*Lokoo Hamy* vs. *Baba Appoo*

Judgment of *absolviter* is not a final judgment.

In this case the District Judge *held* that the action as regards the intervenient and defendand was estopped by a former judgment; but the Supreme Court *set aside* the finding, inasmuch as, in the former case, there was no final judgment, but the defendant was merely absolved from the instance. [No. 15019, D. C. *Caltura*.

November 18, (O.)

In re *Cooray Lekam*.

977.—*Devoodito Appoo* vs. *Juan Coorey*.

Court will not grant administration whese delay is unreasonable and unexplained.

The Prerogative Court of Canterbury does not grant Probate or letters of administration after five years, unless satisfactory reason be shewn for the delay, and this Court will not grant administration after a delay of 55 years. Williams, *On Executors*, p. 292 and 393 [No. 484, *D. C. Caltura*.

November 20, (C.)

978.—*Clarke Romer* & Co. vs. *Vanderstraaten*.

In this case the decree of the District Court was corrected as to the costs, and the plaintiffs were decreed to recover their full costs in the Court below, and in appeal.

Judgment.] The Supreme Court cannot see the slightest ground for making the plaintiffs pay their own costs. The defendant allowed her account with the plaintiffs (her chemists) to run over a period of about two years unpaid, and then disputed the items, admitting less than one half only to be due, viz: £2. 9. 3, out of £5. 15. 10.

A full account or bill of particulars is then called for and submitted to proof on both sides, and only £0. 13. 6 is disallowed thereon, and that also for articles furnished to the members

of the family, who usually procured medicines, &c, supplied to the defendant. [No. 13699, D. C. *Colombo.*

979.—*Say Hamine* v. *Don David.*

A Deed of Gift by a husband to his wife though voidable in his lifetime, may be sustained if he dies without revoking it.

"Plaintiff's claim to the moiety, which is proved to have belonged to her late husband, is also supported by the Deed of Gift from him, which was voidable in his life; but as he has died without any revocation of it, the gift can be sustained. See *Burge*, 275. Grotius *Int.* 1. c. 2, s. 6, p. 284. *V. D. Linden*, 214.

"The objection to the want of stamp is waived; and the 9th clause of the Ord. No. 21 of 1844 cannot apply to the plaintiff's claim under the Deed of Gift, because, upon it, her right has not accrued as devisee, heir-at-law, or as executrix or administratrix." [No. 10164. D. C. *Colombo.*

November 17, (C.)

980.—*Palleneappa Chetty* v. *Tellewenem*

Parol evidence to prove unacknowledged debts must be most unexceptionable.

Where parties have neglected to take any acknowledgment in writing to prove the debt claimed, and rely wholly on parol evidence of it, the Supreme Court has frequently declared that the witnesses must be most unexceptionable to establish the demand. [No. 12930, D. C. *Colombo.*

December 4, (C.)

981.—*Henea* v. *Kiry Hamy.*

The decree of the Court below was amended by the parties being decreed to bear their own costs in the suit, as the demand might have been recovered in the Court of Requests, (the whole of the land not being disputed,) and the plaintiff therefore was not entitled to costs under clause 5 of Ordinance No. 12 of 1843. [No. 6304, D. C. *Ratnapoora.*

December 21, (C.)

982.—*Singo Appoo* v. *Juanis Appoo.*

Prescription can be interrupted only by an *act done*, but not by an omission or failure to do an act.

The mere silence of the defendant and his omission to urge his claim or to raise any objection when he was present, on the field being given to the plaintiff's wife (as he took no part therein) will not defeat his prescriptive title. The Ordinance speaks only of any "*Act*", not of the omission or failure to do an act, although from such conduct an acquiesence by silent implication may sometimes be inferred. It could tend therefore in this case only to strengthen any other evidence which may be adduced, of the defendant having done some act recognizing the plaintiff's title. [No. 15389, D. C. *Colombo.*

Dec. 29, (C.)

983.—*Alende Hamy* v. *Katadea.*.

Interest will cease running if tender is followed by payment of money into Court.

To exonerate the defendant, and stop the running of interest, the tender should have been followed by payment of the money into Court. See 3, *Burge* C. P. 839; Negombo case 4101, 27th November 1839. [No. 6290, *D. C. Ratnapoora.*

In re *T. A. Neuwenhoven.*
T. H. Ver Hoeven, Applicant.
J. E. Eaton, Opponent.

There are two appeals in this Testamentary case. The District Court having dismissed with costs the applications for administration of both the applicant and opponent, they have separately appealed from that judgment.

The intestate went by the name of *Thomas Andreas Neuwenhoven*, wrote it freely, and acknowledged no other name. He died possessed of about £1000 sterling, but is stated to have been extremely close and reserved in his habits,

and to have communicated little about his relations. Mr. *Piachaud* who was examined in this Court as having been his Agent, and who must be considered to give disinterested testimony on both sides, says, "I have tried to make out his "relatives, but I never could make them out. "He told me that he was born at *Galle*, and "left it when he was 18. He was more than "50 years. He was very mysterious about his "relatives. He called himself, and signed his "name *Thomas Andreas Neuwenhoven.* He "wrote it as if used to the signature"; and he adds afterwards, "I had no reason to believe "that he went by an assumed name."

The applicant *Thomas Henricus Ver Hoeven* alleges that the intestate was his younger brother, and that his real name was *Johannes Stephanus Ver Hoeven*; that their parents names were *William Frederick Ver Hoeven*, and *Johanna de Haan*, and two extracts from the baptismal register of the Wolvendahl Church at *Colombo* are adduced, proving that they had a son, *Thomas Henricus*, baptized on the 13th February 1791, and another son *Johannes Stephanus*, baptized on the 22nd September 1793. The applicant called also six witnesses, who depose to his parents having only had these two sons who were the applicant and intestate, and no daughters; that the intestate went early to sea, and on his return to *Ceylon* about 30 years after, they recognized him as the applicant's brother. The District Court has considered the relationship not established upon such evidence, doubting, with much reason, the ability of the witnesses to recognise the intestate after such a lapse of years, when he left so young, that age must have greatly changed him, and when the intestate positively denied the relationship or identity, and did not recognize any of the witnesses as former friends or early acquaintances. Upon closely sifting, moreover, their evidence, it wholly breaks down, as the witnesses are inconsistent in several very important points:

The 1st witness avers that the intestate went to sea in 1812, when he was about 18 *years old;* but 2nd witness says that he knows the intestate left *Ceylon* when about 12 or 13 years old. The 1st witness knew the applicant and intestate when they were 12 *years old,* and were at school together, (about 1803.) The 4th witness was also their school-fellow, and says they were at school for about 2 *years,* and that intestate was about 14 *or* 15 *years old,* when the witness left a year before them, and therefore it would have been about 1806. The 5th witness deposes, that he was also at school with the applicant and intestate, and that they were brothers. The witness went to the school in 1792, and applicant and intestate came there in 1798. Now, in that year, intestate must have been about 3 years old. Yet the witness corroborates his testimony, by adding that he left the school, in 1799. The 3rd witness proves nothing on the point, and the 6th witness speaks to his having known the applicant and intestate as brothers, when he was *ten years* old, and as the witness is *fifty five* years, that must have been about 1807; they came from their grandmother's to his father's; intestate went to sea, and witness had *seen him once or twice* on his return, but had not seen the intestate for forty years, yet he recognized him when he first saw him as the brother of applicant. On such discrepant evidence the Supreme Court of course concurs with the District Court decision in dismissing the applicant's claim.

In regard to the opponent's claim the District Court declares, only, that he had not satisfactorily proved his relationship, but the further evidence produced in this Court seems to satisfactorily supply the deficiency in the proof. The 1st witness for the opponent says that she did not know the intestate's name was *Neuwenhoven* till one day, as he was standing at her door, he pointed to the widow of *Hendrick,* who was passing, and said that she was his brother's widow. Witness asked if *Hendrick* was his brother, he

replied that they had the same mother. He told witness that his name was *Neuwenhoven*. The 2nd witness deposes that intestate was living with last witness, and told him that "he had a sister, Mrs. *Lagarde*, but that she was dead." The 3rd and 4th witnesses depose to the intestate denying that his name was *Ver Hoven*, and saying that it was *Neuwenhoven*, that he had lost his wife and child in *America* and had relations at *Galle*. but none in *Colombo*. The documentary proof adduced by the opponent with the further evidence heard in the Supreme Court, confirms these statements of the deceased, as to his name being *Neuwenhoven*, and his having relations at *Galle*. The casual recognition of his brother's widow while passing, and the admission of his having had a sister, Mrs. *Lagarde*, who was dead, appear truthful and natural; they were also not inconsistent with the habitual reserve that the intestate showed about his relatives, if it arose (as it very probably did) from the fear of being annoyed by their wanting money from him, as he never sought to disclose himself to the widow, and the sister and her only child were dead. Besides there are unguarded moments with the most reserved men, and the expressions led to nothing at the time, and have derived importance only from the documentary and other proof, previously unknown, confirming them. Moreover if these witnesses were untrue, they might have stated so much more, and not confined themselves to such indirect evidence. The extracts adduced from the baptismal and marriage registers shew that *Enno Reimers Neuwenhoven*, and *Florentina Brouswyk Van Dam* had a son *Hendrick Gerhard*, baptised 17th December 1775, and another son *Thomas Andreas* baptised 6th March 1785, and a daughter *Anna Francina* baptised 27th March 1769, who became in 1798 Mrs *Lagarde*, and left no children surviving. The opponent is proved to have married the daughter and only child of *Hendrick Gerhard*, who died having three children, minors, one of

whom died subsequent to the intestate. *Hendrick Gerhard's* widow is an old woman past 80. The opponent, moreover, succeeded to the property of Mrs *Lagarde* and seems justly entitled to administration of the estate of the intestate.

It is therefore decreed that Letters of Adminfstration of the Estate of the intestate be granted to the opponent, and that under all the circumstances of the case, the costs on both sides be paid out of the Estate. [No. 795, D. C. *Colombo.*

984.—*Appoo Hamy* v. *Mudelehamy.*

Illness of a Proctor is a good ground for postponement of a Trial.

At the trial an application was made to postpone the case on account of the first defendant's Proctor being unable to attend through illness (which is always considered a sufficient cause for postponement in the District Court of Colombo); but the motion was disallowed on the ground that, "there were Proctors present on both sides." The defendants, however, had severed in their Answers, and appeared by different Proctors. The affidavit also of the second defendant's Proctor shews that he was quite unprepared to conduct the case of the first defendant, which was the most material in the cause. Under these circumstances the appellants counsel has strongly urged the justice of granting a new trial, and the Supreme Court has been the more inclined to allow it, from its considering that the witnesses of the plaintiff have not been fully examined, and that the proof of the plaintiff's Deed is open to great suspicion, as it is not in accordance with the Kandyan habits, that an old infirm lady of good family, and possessing property, would undertake a journey of some distance for such a purpose, without female attendance. [No. 6241, D. C. *Ratnapoora.*

985.—*Naidehamy.* v. *Kaluhamy.*

Judgment.] The Supreme Court cannot view this case in the same light that the District

Court has done. It is clear that the parties have all been employed in searching for gems on the premises, and if the action were merely to recover damages for the waste done thereby to the field, in rendering it less fit for future cultivation, the Supreme Court would not interfere with the present judgment, looking to the evidence, that all the parties had been concerned in the digging of the pits. But this suit obviously, has wholly originated from a different cause, viz. that a large sapphire of very unusual size has been found on the premises, which has been secreted and withheld from the other parties, and evidence as to its value even has been suppressed. If this gem be a large sapphire of good colour, and without blemish, it must from its great size, be of very considerable, nay of immense value. The plaintiff's 8th witness deposes to its being as large as a pomegranate, or mandarin orange; and the 9th witness says it is larger at one end than another,—larger than a fowl's egg. It is therefore not surprising that this suit should have originated, if the parties consider that they are joint proprietors of the land, where this unusual gem has been discovered, and are equally entitled to share in its value; but at present the Court cannot decide on the respective rights of the parties. The spot where the gem was found is not clearly pointed out, nor are the rights of the parties to such portion of the field, well ascertained. For instance, it seems the Mellaka and Gamegey families hold in tatto-maroo, but the plaintiff and first defendant are of the *Mallaka* family, and the 2nd and 3rd defendants are of the *Gamegey* family. Again, the old suits are between two of the Mallaka family. The tenure in tatto-maroo, moreever, gives only the right to cultivate the soil, and where separate portions are held in turn by parties in tatto-maroo, it is usually owing to one portion being of larger extent, or more productive than the other. Presuming, however, that the parties are joint proprietors of the land, and hold in tatto-

-maroo, there is no proof of their right to gems found in the soil, having been transferred to each other by any Notarial writing, or agreement between them. Moreover, it is stated at the bar, that it can be shewn into whose hands this large Gem passed ; if so, such persons (in whatever station they may be) can be examined as witnesses. And the rule of evidence also is that "*omnia presumuntur in odium spoliatoris,*" and where a person of humble life found a large gem, and gave it to a jeweller, who refused to deliver it back, or to produce it, the jury were told to presume, and give the value of a gem of the highest value of that size. *Armory. v. Delamirie*, 1 Str. 505.

As to the *Royalty*, it will be time enough to decide that right when Government comes forward to assert such a claim. [No. 6294 D. C. *Ratnapoora.*

Collective Court.

January 6, (O. C. S.)

987.—*Taxation of Costs.*

Taxation of Bills of Costs.

On reading the Petition of GEORGE WILLIAM EDEMA and the indorsement of the District Judge of Kandy upon the Bill of Costs in the Kandy cases Nos. 2156/17,896, 1373/17,530 and 16,880 the Judges are unanimously of opinion that Mr. EDEMA is entitled to charge as Proctor for services rendered by him in that capacity, and as Advocate for services rendered by him as Advocate, since his admission as such.

An Advocate entitled to his fees for services rendered previously as a Proctor.

The Judges are also of opinion that in each of the cases 2156/17,986 and 16,880 Mr. EDEMA should as Advocate be allowed only £2 2 for brief fee, and that in the case 1373/17,530 the Advocate's retaining fee should be disallowed, as he had been retained in it before he became an Advocate, and the Registrar is directed to tax the said Bills accordingly. (Coll.)

September 26, (C. S. T.)

988.—*Buller, Q. A* v. *Bretopulle* and others.

Question as to power of Supreme Court to give directions to a District Court to 'give judgment' in any particular manner.

The Judges are of opinion that without entering into the question as to whether the Supreme Court can give specific directions to the District Court to give judgment in any manner therein pointed out, it is better to amend the order in its present form, and it is therefore decreed that the plaintiff is entitled to recover from the Defendants the sum of £229 and costs, as prayed for in the libel, and costs of Appeal. [*No.* 12,730/11,128 D. C. *Colombo.* (Coll.)

November 25, (C. S. T.)

989.—*Nagate,* (now wife of another) v. *Winasy,* (her husband.)

Production of judgment in

The Judgment of the Court below in this case was *set aside* on both the points reserved, the

Collective Court.

a criminal case is not evidence in a civil case for a plaintiff who was a witness in such criminal case.

Collective Court being of opinion, 1st. that the judgment in the Criminal case, by the Police Court—in which the plaintiff gave evidence as a witness for the prosecution—cannot be evidence for her in this Civil action. (1. *Roscoe on Evidence* 102—*Arch. Civil Pleading* 394—1 *Camp.* 9 and 151—4 *East* 572—1. *Taunt.* 520.) 2ndly. that the Court of Requests has not jurisdiction in anything "*whereby rights in future may be bound.*" And in this case the plaintiff seeks to establish her marriage with the defendant, and the right of herself and child to maintenance thereunder. [*No.* 1302, *C. R. Jaffna.* (Coll.)*

990.—*Newelegette* v. *Dingerehamy* and others.

Judgment of Police Court set aside for gross irregularity.

Where the complaint or charge was not entered on the Record Book, nor the defendant called on to plead to the same, as required by the General Rules and Orders for regulating the form and manner of proceedings to be observed in the Police Court, the Collective Court *set aside* the judgment of the Court below, for gross irregularity. [*No.* 211, *P. C. Ratnapoora.* (Coll.)

Nov. 28, (C. S. T.)

991.—*Don Bastian* v. *Cripps.*

District Courts are vested with a discretionary power in ordering the attendance of parties to a suit, to be examined. Lorenz's *Reports* (1857) pp. 126-127.]

The District Court is vested with a discretionary power of ordering the attendance of a party to be examined or not, as it may consider the examination to be necessary, and looking to the reasons given by the plaintiff for requiring the defendant's examination in this case on the renewed motion, and before this Court, there appears no sufficient ground for the same. The Court is moreover of opinion that the appeal from that Interlocutory order did not preclude the District Court from proceeding on to trial as fixed for the *next* day, although the General

* But the 5th clause of Ordinance 10 of 1843 was expressly repealed by the subsequent C.R Ordinances.

Rules and Orders require the transmission of Records with as little delay as possible.

An Appeal from an Interlocutory order need not preclude the Court from proceeding to trial and final judgment, except where the justice of the case requires a stay of proceedings.

Voet says (*Lib : 49 Fit : 1. c : 8.*) '*Non enim aliud nos per appellationem ab interlocutoria lmpeditur, ulterior cognito judicis inferioris, circa causam principalem, pendente super interlocutoriis appellatione*'; and in Courts of Equity in England the general rule is, that an appeal does not stay proceedings without a special ground and order. (*Gwynne* v. *Lethbridge* 15 Ves. 585—*Huguenin* v. *Basely* 15 Ves. 180 and Sect. 16 Ves. 213 and 216—*Wood* v. *Milner* 1. Jac. and W. 636, and *King of Spain* v. *Machado* 4. Russ. 560.) But, with a view to maintain a uniformity in the practice of the Courts on this matter, the Supreme Court is of opinion that the principle which appears to be laid down in *Sir Charles Marshall's* Notes p. 13, should be adhered to, namely, that where the Justice of the case requires the immediate settlement of the point or points raised in any Interlocutory Order, the proceedings should be stayed to allow a Judgment on the appeal therefrom.

Plaintiff entitled to a postponement on his affidavit that certain of his material witnesses are absent.

The present decree, however, cannot be supported, as it is not only founded on an erroneous view of the Law of Evidence, (See *Phil. Ev.* 2nd Vol. p, 299) ; but because the District Court ought to have allowed the plaintiff's motion for a postponement of the hearing upon his affirmation that three of his material witnesses to prove malice were absent, inasmuch as without express evidence of this nature, the plaintiff could not safely proceed to trial, although he should succeed in giving sufficient secondary evidence of the letter in question, which he was entitled to do.

Certain reasons for ordering costs of appeal to be costs in the cause.

Both appeals having been brought on at the same time, and the questions raised in them being in some measure of unusual occurrence in the District Courts, the costs of the appeal are ordered to be costs in the cause. [No. 10,965 D. C. *Galle* (Coll.)

Dec. 2, (*C. S. T.*)

992.—*Andona*, widow, and others v. *Don Pauloe.*

Non joinder of parties to a suit—Costs on amendment of Pleadings in consequence thereof.

The decree of the District Court was amended by the cause being ordered to stand over, with leave to the plaintiffs to amend their libel, by making the two daughters of the 1st plaintiff by her second marriage, parties to the suit.

Per Curiam.—On objections, for want of necessary parties, being taken at the hearing, the District Court should generally allow the cause to stand over, with leave to amend the pleadings; and in respect to costs, they should be made to depend upon whether the objection could have been taken on the pleadings, and was likely to have been known to the opposite party previous to the trial, in which case the costs of the day should be divided. [No. 36,917—33,216. *D. C, Colombo.* (Coll.

December 5, (C.S. T.)

993.—*The Queen* v. *Gammegey Aberan*, convicted of *Murder* at Matura.

A prisoner not having availed himself of his right to challenge a juror under age, cannot, after conviction, move in arrest of judgment, on that ground.

The Court does not consider that the objection is a ground for a motion in Arrest of judgment within the 11th Rule of the General Rules of Practice, for proceedings before this Court in its Criminal jurisdiction, (1. *Chit. Cr. Law* 661); and the Court also considers that the juror being under the age of 21 years was ground for challenge, and that the Prisoner not having availed himself of that right at the trial, the objection comes too late, after conviction. *King*, v. *Sutton*. 8. B. and C. 427. *Hill*, v. *Yates*. 12 East 229, and 1. Chit. C. L 654 and 541. (Coll.)

994.—*Paykir Lebbe* v. *Assa Oemma* wife another.

Under the Roman Dutch Law, it is necessary before a

In this case the Plaintiff was allowed to proceed with the suit on obtaining from the District Court an appointment as legal guardian. The costs of the Appeal to be costs in the cause. And *Per* Cu-

RIAM. "The practice at Jaffna appears to be hitherto unsettled on the point, whether a person could sue as next friend or *prochein amy* for an infant, as in the Courts of Equity in England, without being appointed by the Court the legal guardian, or *curator ad litem* at least, which this Court considers to be necessary under the Dutch Law." [No 4134, *D. C. Jaffna.* (Coll.)

person could sue on behalf of an infant that he should be appointed *curator ad litem*, (See Lorenz's Notes on Civil Practice)

995.—*Siman Appoo* and others v. *Don Louis* and another.

Correction of an error and entry of a decree 'nunc pro tunc.'

Judgment. That the Interlocutory decree of the District Court of *Hambantotte* of the 21st day of October 1842, be amended by altering the date of the decree of the District Court set aside thereby, from '1st *March* 1842' to the '7th *September* 1842', and that the said Interlocutory decree, when so amended, be entered '*nunc pro tunc*' as of the date when the same was pronounced viz; the 21st October 1842.

There has been a clear mistake in the Interlocutory decree aforesaid in inserting the date of the first decree of the District Court, which had been previously set aside by the Supreme Court, in lieu of the second decree; and the Court ought therefore now to correct this error in such manner as is likely to incur the least inconvenience and expense to the parties. [*No.* 1230. *D. C. Hambantotte* (Coll.)

996.—*Don Juanis* and others v. *Siman de Silva* and another.

The Supreme Court is of opinion that the gift made to *Andeya* and *Baleya* was an absolute gift, and that the '*Injunction*' contained against the sale of the land—except in case of very urgent necessity, when it should be sold to the original proprietor—must be considered to be only directory of the wishes of the grantor on that subject, but not as a condition in Law annexed to the gift, upon the breach of which, the estate of the donee would determine or be forfeited, and the donor or his heirs have a right therein to re-enter and claim the land, no

reversion having been reserved by the deed to the latter for that purpose.—[*No.* 12,424, *D. C. Matura* (Coll.)

December 16*th*' (C. S. T.)

997.—*Malhamy* and others v · *Pulingooralle.*

The defendant could not adduce in evidence against the plaintiffs in the present suit the judgment in the former case 6327, as the plaintiff's were not parties to that former case, nor do they claim under their mother, who was the plaintiff therein, and suing in her own right and behalf—[*No.* 16,884, *D. C. Kandy* (Coll.)

The Queen v. *Habiboo Mohamado.*

Judgment of D. C. dismissing an Information by the Q. A. for breach of Ord. No. 12 of 1840 *set aside*, and the case remanded back to the D. C. for further investigation.

Certain evidence for the Crown led before the D. C. held sufficient *primâ facie* proof of the Crown's title to land, so as to call on the Deft. to rebut such proof.

The words of the Ordinance "probable

December 23*rd*, (C, S. T.)

998.—*The Queen* v. *Habiboo Mohamadoo.*

[From ' Murray's Reports,' pp. 51 to 62.]

This was an Information preferred by the Queen's Advocate under and for breach of the Ordinance No. 12 of 1840, inasmuch as the defendant did 'knowingly and unlawfully, and 'without probable claim, or pretence of title, 'encroach upon and take, possession of the piece 'of Crown-land called *Assedinnay Watte* of the 'extent of half an acre, and of the value of £10, 'situate at Gampola.'

The Information was laid on the 1st clause of the Ordinance which enacts 'That it shall and 'may be lawful for the District Court, upon 'Information supported by affidavit, charging 'any person or persons with having, without 'probable claim, or pretence of title, entered 'upon or taken possession of any land which 'belongs to Her Majesty, her heirs or 'successors, to issue its summons for the 'appearance before it of the party or par- 'ties alleged to have so illegally entered 'upon or taken possession of such land, 'and of any other person or persons whom 'it may be necessary or proper to examine 'as a witness or witnesses, on the hearing of 'such Information; and the said District Court 'shall proceed in a summary way in the

Collective Court.

The Queen v. *Habibo Mohamado.*

claim or pretence of title," construed as requiring proof of a "probable claim" or of a "*probable* pretence of title."

'presence of the parties, or in case of wilful 'absence of any person against whom any 'such Information shall have been laid, then in 'his absence, to hear and determine such Infor-'mation; and, in case on the hearing thereof, 'it shall be made to appear by the examination 'of the said party or parties, or other sufficient 'evidence, to the satisfaction of such District 'Court, that the said party or parties, against 'whom such Information shall have been laid, 'hath or have entered upon or taken possession 'of the land mentioned or referred to in such 'Information, without any probable claim or 'pretence of title, and that such party or 'parties hath or have not cultivated, planted, 'or otherwise improved and held uninterrupted 'possession of such land for the period of 'thirty years or upwards,' [limited to *five* instead of *thirty* years by Order of the Privy Council of 11*th August* 1841.] 'then, and 'not otherwise such District Court is hereby 'authorised and required to make an order, 'directing such party or parties to deliver up 'to Her Majesty, her Heirs, or successors, 'peaceable possession of such land, together 'with all crops growing thereon, and all build-'ings and other immoveable property upon 'and affixed to the said land, and to pay the 'costs of such Information."

The Defendant pleaded *not guilty.*

The 1*st witness* called for the Crown was the Cutcherry Modliar, who stated that the Defendant presented a Petition to the Government Agent accompanied with the translation of a Notarial Deed, on which he relied, as proof of his title to the land in question,—that *Gampola* was generally reported a Royal Village, and that the land in question was within its limits. The *second witness* stated: "I know the piece of land on 'which the Defendant built a house six or seven 'months ago. The land had been in the occu-'pation of *Ahamado Pulle,* and whenever '*kurakkan* was sown he took the owner's share.

Collective Court.

The Queen v. Habibo Mohamado.

'He performed *rajakaria* for it. On seeing 'Defendant building a house, I told him it was 'Crown land; he said he purchased the land. 'It is *not* within the limits of the Royal Vil- 'liage, but there are Crown lands not within 'those limits. The people of the Royal village 'always possessed this piece of land—no dis- 'tinct service for it. It was waste when the 'Defendant was building the said house. Recol- 'lect a man, *Pitchie*, built a house on it, but it 'fell down—(it was) only a hut, and built three 'years before Defendant built his house. *Pitchie* 'never lived in the hut—it stood only a year. 'I live within a mile of the land, there are coffee 'bushes on the land—where does not coffee 'grow? It was quite waste three years ago. I 'know *Don Carolis Appoo* who occupies the ad- 'joining land—who got a grant from Govern- 'ment for it on payment.'

Third witness I know the piece of land. I 'did not cultivate it, but allowed others to 'do so and took the owner's share, conceiving 'I had a right to it. I performed service for 'the land to the Crown. I possess a paddy 'field belonging to the Crown, of which this is 'an appurtenance. I did not give the land to '*Pitchie* or to Defendant. I have not taken 'any produce for the last 20 years, nor has the 'land been cultivated during that period. De- 'fendant did not cultivate the land, but built a 'hut upon it. I considered the land to be my 'parveny property. My ancestors possessed it, 'and it descended to me, and I am not aware 'that the Crown has any right to it."

The evidence of the Government Surveyor shewed that the land was 'claimed by the vil- 'lagers generally;'—'there was no hut on 'the land when I surveyed it in 1843; but 'hut upon it now. It was not then cultivated.'

The Notarial Deed 'B.' filed by the defendant is dated 14th *June*, 1844 and purports to be granted by *Pitche Mohamado* son of *Pitche Tamby* :—'I have this day bargained, and sold

Collective Court.

The Queen v. *Habibo Mohamado.*

'to *Mohamado Lebbe* (*alias*) *Habiboo Mohamado* 'a garden one *pela* in extent, with all the plan-'tation thereon as included in the Tamil Title 'Deed No. 575 attested by *Lebbe Saiboo*, Nota-'ry Public, in my favor, on the 21st September '1840.'

The District Judge (7th *August* 1846) pronounced the following judgment: 'The Court 'does not consider it necessary to call on de-'fendant for any defence—being of opinion that 'it has not been proved that the land alleged to 'have been encroached upon is the property of 'the Crown. The defendant had also a pretence 'of title under Deed 'B.' filed. The evidence 'also as to whether the land be uncultivated, or 'unoccupied, so as to bring the case within the '6th clause of the Ordinance, is contradictory 'and unsatisfactory. The Assessors concur, 'and the Information against the defendant is 'dismissed.'

This Judgment was appealed from on behalf of the Crown, and the case was reserved for Collective decision.

The Deputy Queen's Advocate (*Mr. H. C. Selby*) in support of the appeal: The object of the Ordinance was to prevent encroachment on Crown lands generally—not Crown *waste* lands only; and the first section of the Ordinance, on which this Information was founded, contained no special reference to waste land, whereas it distinctly contemplated and made provision for the case of a trespasser having 'cultivated planted or otherwise improved' the land he had taken possession of. The Crown had a right whenever a trespass was committed on land it claimed, to put the trespasser to proof of his title, unless he had 'cultivated, planted or otherwise improved, *and* held uninterrupted possession' for five years. The proceeding contemplated by the Ordinance was in some respects analagous to the Information of Intrusion in England, where until the Statute of 21. *Jac.* 1, c. 14., the defendant was bound to shew his

title specially, and could not in any case rely merely on his possession, however long; and unless he set up and proved a title in himself, the mere fact of the intrusion would only be enquired of; 'for a title for the King appears upon the Information, if no title appear upon record for the defendant.' (Chitty's *Prerogatives of the Crown, p.* 333). Since that Statute however, 20 years' possession by the defendant might be given in evidence under the general issue, and the defendant need not plead his title specially; in which case if such possession was proved, he was entitled to retain it, until the title had been tried and found for the Crown. Our Ordinance had shortened the period from 20 years' possession to 5 years' cultivation and possession; but had not departed from the principle which still obtained in England, of requiring the defendant who had been less than twenty years, (or with us less than 5 years) in possession, to plead specially his title, by assuming the title in the Crown as averred in the Information, 'if no title appear on record for the defendants.' This applied with greater force to lands in the Kandyan country where, as was well known, all lands were held either directly or indirectly from the sovereign, on tenure of service called *Rajakaria*. With respect to *waste* lands, the 6th clause of the Ordinance specially provided that irrespective of possession, they should be presumed the property of the Crown until the contrary was proved.

In the present case the Crown had given evidence that the land encroached upon was waste and uncultivated; and moreover, that whenever at long intervals it had been cultivated, the cultivator performed *Rajakaria* for it, thus admitting the right of the Crown. Such land the 6th section of the Ordinance expressly declared should be presumed to be Crown property.

The defendant had therefore to shew, either 'a *probable* claim or pretence of title'; or five years' cultivation *and* uninterrupted possession. Of the latter there was no evidence whatever; and with respect to the former, the defendant had rested satisfied with filing a document, which purported to be a Deed conveying this piece of land to him by a third party. But that Deed shewed no sort of title in the alleged vendor, and was a modern instrument; so that there was no room for the presumption that there had existed sometimes a grant of the land to such vendor, which had been lost. In fact on the face of this Deed there was reason to conclude that the pretended vendor never had any title at all. The defendant must be armed not merely with a pretence, but with that which amounted to a *probable* pretence, of title. The grammatical construction of the sentence shewed that *probable* applied both to *claim* and *pretence*. The adjective *probable* referred to both the following substantives, and if a claim (which is perhaps something more than a pretence) must be a probable one, which was undeniable, surely a pretence must be a probable one also. The words claim or pretence in the Ordinance were used to express the same thing. Indeed the word pretence meant claim. Thus *Locke* used it,—'Primogeniture cannot have any pretence to a right of solely inheriting property or power.' If then a claim must be a probable one, it seemed unreasonable, as well as ungrammatical, to hold that a mere naked, improbable pretence, would be sufficient.

Now *probable* meant 'likely—having more evidence than the contrary'—so that the defendant ought to shew a *primâ facie* case of title as against the Crown. He must have an *apparent* title—that which afforded more evidence to the mind that he had a title, than the contrary. It followed that he must give *some* evidence of title. But the deed produced (supposing it proved) furnished no evidence *per se* as against

Collective Court.

The Queen v. Habibo Mohamado.

the Crown, of any title in the defendant's vendor, and being of quite recent date, raised no presumption of title in either of them, but rather the reverse, for looking at the date and wording of the Deed, and the facts disclosed in evidence, it seemed not improbable that the Deed had been got up expressly for the purposes of this case.

R. MORGAN (Advocate) *contra*:—It is unnecessary to enter into the consideration of the question whether the prerogative of the Crown insisted upon, extended to the Kandyan Districts; for even if it did, the provisions of the Ordinance under which the present proceedings were had, excluded the exercise of it. The Royal Prerogative might be abridged by grants, &c. made to the inhabitants of a conquered country. (CHITTY'S *Prerogative p.* 33.) Although in an action brought under the common law, irrespective of the Ordinance, prerogative rights might prevail, yet where the Crown instituted proceedings under the Ordinance and sought the benefit of it, its provisions must be strictly conformed to, and the peculiar form of proceeding it prescribed, adopted. In order to entitle the Crown to judgment under this Ordinance, the first clause requires that it should be shewn (1) That the defendant entered upon and took possession of Crown land; (2) that the defendant had no probable claim or pretence of title to the land; and (3) that the defendant had not cultivated, planted, or otherwise improved and possessed the land for five years and upwards. The evidence shewed that these requisites had not been complied with. Instead of shewing that the land belonged to the Crown, it was shewn by the third witness called by the Prosecutor that the land was formerly his property, he having inherited it from his ancestors. The defendant claimed under this very witness —this shewed a probable claim, and the Deed in defendant's favor produced by the D. Q. A. shewed, in addition, a pretence of title. The 'pro-

bable claim' stood contradistinguished from 'pretence of title.' The former seeming to confer claim founded on possession or otherwise, irrespective of any title arising from sale, gift, bargain, &c. evidenced by a writing, which falls under the second head of a 'pretence of title.' Hence, where there is no writing to substantiate the right, it is necessary to shew not a naked claim only, but a *probable* one; whereas, where there is a writing, which is a higher species of evidence than oral testimony, the adjective *probable* was dropped, and a naked *pretence* was deemed sufficient. The Title Deed in favor of the defendant more than answers this requirement. With regard to the third requisite, it clearly appears that the defendant did cultivate and possess the land for more than five years. The term is general and not restricted to any particular period of time. The 2nd clause of Ordinance No. 8 of 1834 requires that the 10 years necessary to constitute prescriptive title, should be "ten years preceding the commencement of the suit"—there is no such provision here. The Crown having failed to prove these requirements (and the necessity to prove them is undoubted when it is considered that such proof must be adduced even in case of the 'wilful absence' of the defendant) the defendant is entitled to judgment. The objections urged related to matters of fact, and the Supreme Court was always loath to interfere with the finding of a District Court as to facts. It should be more scrupulous to do so in the present instance, because by the Ordinance the Crown is entitled to judgment on proving the different matters before mentioned to the 'satisfaction of the District Court,' and 'not otherwise.' Moreover the remedy being a summary one, it caused considerable hardship to the defendant, whereas no kind of injury could accrue to the Crown, because the 2nd *cl.* reserves to it the right, in case of the dismissal of an Information, to bring another action to try

the right of property in the ordinary course of law.

The Supreme Court (23rd *December* 1846,) pronounced the following judgment (which was unanimous except on one point, *viz.* the construction of the words of the Ordinance, 'probable claim or pretence of title',—*Stark* J. holding that the Ordinance required a '*pretence* of title' merely, and not a '*probable pretence* of title.') :—

'The Court is of opinion that this case 'should go back for further investigation, the 'Crown having sufficiently proved its right to 'the land to require the defendant to rebut it 'by some evidence, either (1) of his having a 'probable claim or pretence of title to the land, 'or (2) of his having cultivated, planted, or 'otherwise improved or held possession thereof 'for the period of five years.

'In the argument of this case, the D. Q. A. 'relied much upon 'the Prerogative right on an 'Information of Intrusion, of putting the de-'fendant on shewing his title specially' ; (Chit-'ty's *Prerog. p* 333.) but it appears to be unne-'cessary for the Court to decide that important 'question, of how far this prerogative right ex-'tends to, and can be enforced in, the old Kandy-'an Districts, because it is clear that this Or-'dinance has prescribed a different mode of 'proceeding in summary proceedings under it, 'for obtaining the possession of Crown land en-'croached on.

'Looking to the provisions of the Ordinance 'respecting the Information, and the affidavit 'in support thereof, it would seem that both 'need only charge a person or persons, with 'having without probable claim or pretence of 'title entered upon or taken possession of any 'land belonging to Her Majesty, Her Heirs and 'Successors, and that therefore the Crown need 'adduce evidence only to that effect ; as accord-'ing to the general rule, the complainant is 'required to prove only material and necessary

'averments in the Libel or Information, and 'any matter of justification should come from 'the defendant; but the Legislature in this 'Ordinance, has thought proper to specially 'declare respecting these Informations for pet- 'ty encroachments, that, in case on the hearing 'thereof it shall be made to appear, by the 'examination of the party or parties, or other 'sufficient *evidence* to the satisfaction of the 'District Court—(1) that the party had entered 'or taken possession without any probable 'claim or pretence of title (2) that such party 'had not cultivated, planted, or otherwise im- 'proved and held uninterrupted possession of 'such land for the period of five years or up- 'wards, '*then and not otherwise*,' the District 'Court may order the defendant to deliver up 'possession: Now as the D. C. is authorised 'to proceed in the absence of the defendant 'and, in such event, it is not declared that less 'evidence would suffice, the Court is of opinion 'that as the D. C. can give no judgment in 'favor of the Crown without sufficient evidence 'before it upon the above two points, it follows 'necessarily that the *onus probandi* in these 'summary proceedings lies on the Crown to 'adduce *primâ facie* evidence on both those 'points.

'In the present case the Court is of opinion 'that the Crown has adduced such evidence, 'and that although not free from discrepancy 'and objection, and liable also to be wholly 'rebutted by proof on the defendant's part, 'the evidence as it stands, sufficiently proves 'the land to belong to Her Majesty, and to 'have not been cultivated or possessed for five 'years, so as to call on the defendant to rebut 'such proof, and on his failure to do so, to ad- 'judge the defendant to deliver up to her 'Majesty the peaceable possession of the said 'land.

'The evidence of the *Lekame*, that he poss- 'esses a Government paddy field to which this

'land is an appurtenance, might be especially 'noticed on this point, and his not having taken 'the produce of this land for twenty years '(though claimed by him), and its not having 'been cultivated for that period, tend to shew 'that it must be considered as chena or waste 'land, which, under the 6th *cl.*, belongs to the 'Crown until the contrary be proved.

'Then, as to the possession for five years and 'upwards. It is in evidence that the *Lekame* 'never gave the land to *Pitche* (the alleged 'Vendor to defendant) or to the defendant; 'that *Pitche* built a hut thereon about three 'years before the defendant; that he never 'lived in it; and it stood only for a year; that 'the defendant built his house 6 or 7 months 'ago, and that, at the time the defendant was 'building the house, it was waste land,—and 'the *Koralle* then told him it was Crown land;— 'as to the coffee bushes growing on the land 'here and there, they may have been sown by 'the birds, or put in when the hut was built by '*Pitche* and abandoned therewith; and without 'any proof of their being planted, their age, 'culture, or exclusive possession of the pro-'duce thereof, the Court cannot consider them 'as sufficient evidence of the garden having been 'planted, improved or cultivated for the period 'of five years within the Ordinance.

'The only remaining point is the defendant 'having a '*pretence* of title,' under the deed 'B' 'filed, as held by the District Judge; but 'whether he (defendant) has or not still remains 'to be proved in the opinion of this Court.

'No evidence has yet been taken in support 'of the Deed itself, and although the D. Q. A. 'has for the sake of argument (to get the 'opinion of the Court as to the effect of such 'deed being produced and proved in evidence,) 'admitted it, the Court considers such a deed 'being proved, (when viewed as it ought to be 'with all other facts and circumstances in 'evidence before the Court), ought not to be in

'itself held a probable claim or pretence of title 'within the true meaning and intention of the 'Ordinance, without some further proof of title 'by the defendant.

'*Probable*' is that which has more of evidence 'for than against it ;—which is more likely to 'be true and substantial, than false and unfound-'ed; and a majority of the Judges think that ''probable' appears in this sentence to be 'equally applicable to 'pretence of title' as to ''claim,' because the former cannot be construed 'in its bad sense. It is a general rule that 'where the title to property comes in question, 'the exercise of a summary jurisdiction by a Jus-'tice of the Peace is ousted. (Burns' *Justice. Vol.* '1, *p.* 333 ; *title*, Conviction) ; but it is also held 'that this rule ought not to be so extended as 'to enable an offender to arrest the summary 'jurisdiction by a mere fictitious pretence of 'title, or an assertion of right, where the party's 'own shewing, or other manifest circumstances, 'proves the claim to be groundless. The 'whole sentence ought moreover to be taken to-'gether and judged by its context, and then 'the words, 'probable claim or pretence of title' 'will amount closely to 'colourable title.' 'In *Hunt* vs. *Andrews*, (3, B. & C. 346.) which 'was an action for a penalty, Chief Justice '*Abbot* said, 'It has been held however, that in 'an action brought to recover a penalty, it is 'sufficient for the defendant to shew that he 'was acting under the appointment of a 'person who has a *reasonable ground of title* 'to the manor, for that is what I understand by 'the words *colourable title*' ; so, in a similar 'case, *Rushworth* vs. *Craven* (*McClell.* R. 422.) 'GRAHAM, *B*, said 'But the Court requires the 'party to shew some *colourable title*, that is, 'as I understand it, some *primâ facie* evidence, 'affording a *fair presumption of title*, in the 'person claiming it' ;—and in the first mentioned 'case, the Court held that proof of a deed of 'purchase, reciting prior deeds of conveyance,

Collective Court.

The Queen v. Habibo Mohamado.

'(which were not produced with it), did not 'shew a colourable title, when viewed with 'evidence of title from the opposite party 'repudiating such colourable title, and having 'a tendency also to prove, that the party claim-'ing a right ought to have known that he had 'no title whatever.

'In the present stage of this case, the Court 'can, in justice to the defendant, express no 'final opinion whether he has or has not *bonâ* '*fide* a colourable title. It considers the case 'to have been wrongly stopped, and that the 'District Court should have called on the defen-'dant for his defence: the Judgment is accord-'ingly *set aside*, and the case remanded back 'for further investigation. [No. 6108. D. C. '*Kandy.*]

December 23rd, (C. S. T.)

999.—*Godinho*, vs. *DeKoning.*

[From 'Murray'sReports'—pp. 52—65.]

Godinho v. De Koning.

A Grant of land to the Church of 'Saint de Croos,' without naming a Trustee, is valid. The Incumbent who is appointed Manager 'of the Church and property thereof' can maintain an action under such Deed. The English Statutes of

In this case certain land was seized under a Writ of Sequestration, as the property of the defendant; but the plaintiff opposed the sale thereof on the following grounds:—

(1). That the plaintiff was 'the presiding 'Roman Catholic Missionary at *Batticoloa*, 'and Manager of the Church and property 'thereof.'

(2). That the Paddy-field in question 'was 'lawful purchased property belonging to the 'Church of *Saint de Croos* of *Batticaloa*,' as 'appears by the Title Deed dated the 3rd No-'vember 1807, marked 'A.'"

(3). That the said Church "had possession 'of the land, as per Title Deed thereof, ever 'since the purchase.'

The Title Deed produced, which was execut-ed by a private party, "sold, assigned, and transferred unto the Church of Saint de Croos,' the land in question, 'for and in con-'sideration of the sum of *Rds.* 50, which

amount of *Rds.* 50 has been fully received by me."

The defendant excepted to the Title of the plaintiff 'inasmuch as the supposed olah Deed 'filed does not exhibit in itself the essential 'requisites, expressing sufficiently the proper 'name or names of any person or persons, the 'Grantee of the plaintiff's ancestors or prede- 'cessors, to make a good Title.'

Mortmain do not extend to the Colonies. Dutch Law restricting donations of this description, not acted on by English Government, in Ceylon. The Dutch Civil Law does not recognise the technical distinction of the English Law in construing Deeds and Contracts differently from Wills.

The District Court (24*th August* 1844) dismissed the plaintiff's application to have the land released from seizure—being of opinion that the olah Deed produced was not a legal Deed, inasmuch as (1). The Church alone, and no Trustees were named in it, consequently there was no person able to be contracted with; and (2). There was no one to deliver to, and no delivery could therefore have taken place under the Deed.

The plaintiff appealed, and the case came on at *Jaffna* on the 18th *July* 1846, and was then, by the Judge on Circuit, reserved for Collection decision.

The Queen's Advocate (Mr. *Buller*) in support of the appeal: The appellant, as Incumbent and manager of the Church and property thereof had a title to sue;—if he had not, the Grant to the Church was void, and no religious body in this Island could maintain its rights. This is the first time the doctrine of the District Court Judge was mooted in Ceylon. Here, from time immemorial, the terms of Grants to Temples have been "to the Temple," not "to the Priest and his successors"; and the Supreme and District Courts have frequently recognised such Grants as valid. The English Law on this point was not in force in Ceylon; but even in English law, with all its technicalities, by that branch of it which regulated the operation of Deeds for charitable purposes, this Grant would be held good. (Roberts, *On Wills.*)

Acting Chief Justice, (Mr. *Carr*)—There is no doubt as to Wills.

The Q. A.—Then all Deeds for charitable purposes stand on the same footing as Wills.

A. C. J.—There is no delivery in Wills.

The Q. A.—There was delivery in this case to the Incumbent; though in gifts *ad pias causas,* the presence of the donee to accept is not necessary to complete the transfer. The English Courts are very liberal in construing Charitable Trusts. (*Bacon's Abridgement,* i. p. 584). Misnomers will not prevent the operation of a Deed, provided it contains, otherwise, enough to shew who is meant.

Stark J:—referred to the Ordinance No 2 of 1840 as evidence of the customary law of this Colony to grant lands to 'Temples.'*

The Q. A.—In a recent prosecution for theft of property belonging to a Temple, *Oliphont C. J.* directed that the stolen goods should be laid as the property of 'the Temple,'

The Supreme Court on the 23rd *December* 1846, *set aside* the Judgment of the D. C. in the following terms:—'The Plea is over-ruled 'with Costs, and the defendant is ordered to 'answer, within such time after this order shall 'have been notified to her, as the D. C. may 'appoint.

'The Supreme Court is of opinion that 'according to the prevailing law and usage in 'this Colony, Deeds in this form, *ad pios usus,* 'are valid, and that the plaintiff as the 'Roman 'Catholic Missionary at Batticaloa, and the 'Manager of the Church and property thereof,' can maintain this action on such Deed, if duly proved.

'The Statutes of Mortmain do not extend to 'the Colonies of Great Britain. (2. *Burge,*C.L. *Att. 'Genl.* vs. *Stewart,* 2. Mes. 143.); and the Dutch

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* The Ordinance No. 2 of 1840 was *disallowed* by the Queen. See however Proclamations of 21st *November* 1818, and 18th *September* 1819.—*Ed.*

Law restricting donations of this description, '(*Voet*, lib. xviii. tit, 1—2; and *Van Leeuwen*, 'p. 266; and also 2. *Burge*, C. L. p. 455.) do 'not appear to have been acted on or enforced 'by the English Government in this Island. '(*Regulation* iv. of 1806).* By the Kandyan 'Proclamation [previously referred to] all dona-'tions and bequests of land, however, to the use 'of any Temple 'whether Wihare, Dewale, or 'otherwise,' are restrained, without license from 'the Governor; and from the recital it appears 'that it was theretofore customary for such dona-'tions to be made with the consent and license 'of the Sovereign's authority:—But the Ordi-'nance (commonly called the *Mortmain Ordin-'ance*), No. 2, of 1840, for extending through-'out the Island these provisions, and 'to restrain "gifts or dispositions of lands for religious pur-'poses,' was disallowed by Her Majesty.

'From *Viner's Abridgment*, tit 'Grant' 4, it 'seems that from ancient times a Grant '*Deo et 'Ecclesiæ*, was good, or if a man gives lands *per 'dedi et Concessi Ecclesiaæ de D*,' this goes to 'the parson and his successors, and this con-'struction now prevails in Wills, where the in-'tention only of the Devisor is regarded; and it 'will therefore suffice in Wills, if by the des-'cription the meaning and intention of the De-'visor is apparent: thus a devise '*Ecclesiæ 'sancti Andreæ de H*,' would be a good dona-'tion by Will to the Corporation or the 'Parson of the said Church, and his suc-'cessors, 'for such description was suffici-'ent in a Will to express the Parson of 'the Church and his successors, because though 'not named in the devise, he was comprehended 'in it,' (Powel *On Devises*, Vol. 1, p. 338.; 10 '*Co*. K. R. 57-60). In the Dutch Civil Law the 'technical distinction of the English Law, in

* See also *Regulation* v. of 1829 and 10 *Geo*. iv .c 7. "For the relief of His Majesty's Roman Catholic subjects."—*Ed*.

Collective Court.

Godinho v. *De Koning.*

'construing Deeds and Contracts differently 'from Wills, is not recognised, but the intention is preferred. (*Vanderlinden*, p. 192). A 'Deed therefore is not avoided by any misnomer 'of the Donee, provided the intention appear 'sufficiently clear and certain."—[No 9,523. *D. C. Batticaloa.*]

Unnanse v. *Maha Naike Unnanse.*

Deceased party to a suit has no right to proceed therein, until he is made a party defendant by an Order of Court. Superannuated Judgments must be revived.

1000.—*Unnanse*, v *Maha Naike Unnanse.*

[From 'Murray's Reports'—pp. 65—67.]

This was a long pending case, the original action having been instituted in 1833, and delayed in consequence of the loss of the Record and other causes.

It was a suit for the recovery of certain land of considerable value claimed as belonging to the Temple 'Marasana Wihare.' On the 5th of *August* 1834, the plaintiff obtained Judgment in the D. C. which was *affirmed* in appeal on the 12th *August* 1835. The defendant then intimated his intention to appeal to the King in Council, but whilst inquiries were in progress to ascertain the value of the property in dispute, in reference to the Appeal to the King, the Record was lost. In this state of matters the plaintiff applied for and obtained a Writ of Sequestration by virtue of which he, on 1st *April* 1840, sequestered the crop of the said land, which sequestration was still in force when the case came on in Appeal.

The original defendant having died, his representative *Induvellegodde Unnanse*, on the 23rd *April* 1846, moved the D. C. to dissolve the Sequestration, as the plaintiff had taken no steps in the case since *April* 1840. With this motion the present defendant filed his affidavit, that he 'is the lawfully constituted exe'cutor of the estate of the deceased defendant, 'and that this affirmant on the death of the said 'deceased, became the defendant in the said 'suit, as the Executor as aforesaid, and had the 'conduct and management of the same in that 'capacity; and further that he is the present 'Incumbent of the Temple *Marasana Wihare.*'

The D. C. on the 24th *April* 1846, rejected the motion with Costs, being of opinion that the plaintiff ought not to suffer from the loss of the Record, but that he was entitled to reap the fruits of the judgment in his favor.

Against this Order the defendant appealed.

R. Morgan (*Advocate*) was heard in support of the appeal,

J. Stewart (*D. Q. A.*) appeared for the Respondent.

On the 23rd *December* 1846, the Supreme Court *affirmed* (though on different grounds) the decision of the District Court rejecting the motion :—

'It is considered and adjudged that the Interlocutory Order of the 24th *April* 1846 be *affirmed* as to the motion being rejected with Costs.

'The Supreme Court is of opinion that *Induvellegodde Unnanse* cannot, until he is substituted in the place of the late defendant, by 'an Order of the District Court, maintain any 'motion to set aside the present sequestration as 'irregularly issued or enforced, because he has 'no *persona standi* in the cause to do so.

'Upon inquiry the Supreme Court finds that 'it has been wrongly stated at the Bar, that it 'is the prevailing practice in the D. C. of 'Colombo not to revive a judgment unless ex'ecution has been taken out under it for a year. 'Any such practice would be irregular. *Van'derlinden* (p. 423) in speaking of Citations to 'hear such execution decreed, says, this takes 'place, *first*, when the Decree or Sentence of 'which execution is sought has become super'annuated, &c. ; and, *secondly*, when the party 'condemned is dead, or, by being placed under 'curatorship, has lost the *legitimam personam 'standi in Judicio*. In this case the Decree 'before it can be put in execution, must be 'declared executable against the Heir or Curator. '(See *Vanderlinden*, p. 28. ; *Grant*, C. P. *Vol.* '1. p 161. ; and *White* v *Hayward*, 2. *Vesey* '462 ; 1. *Mer*. 154.) The Supreme Court there-

Collective Court.

'fore sees no ground to dissent from its former 'Order requiring this case to be revived—[No '17,313, *D. C. Kandy.*]

6th *January.* (C, S. T.)

1847

1001—The *Queen's Advocate*, vs. *Sadris Mendis* and others,

[From 'Murray's Reports'—pp. 67—70.]

Queen's Advocate v. Mendis and others.

Proof of long cultivation and payment of tax, coupled with production of two old Deeds in favor of defendants, constitutes such a *primâ facie* title, as amounts to a 'probable claim or pretence of title' under Ordinance 12 of 1840.

In Summary proceedings under this Ordinance, the D C. has no power to decide on validity or otherwise of an old Deed, apparently gennuine, which had been accompanied by possession.

This was an Information by the Q. A. under the Ordinance No. 12 of 1840, claiming for the Crown certain land alleged to be the property of Her Majesty, which the plaintiff alleged that the defendant had, in *February* 1844, un-'lawfully, and without probable claim or pretence of title, entered upon and taken possession of.' [See No. 6108, D. C. Kandy, *ante*, p. 460.]

The defendants pleaded *Not guilty.*

Evidence was adduced in proof of possession and cultivation of the land by defendants for upwards of 20 years, and of payment by them to Government of the usual rate of tax exigible for private lands. The defendants also relied on two very old Deeds or Grants of the land in question, in favor of their predecessors.

The following is the judgment of the District Court:—[*September* 25th, 1845]. 'The '6th *cl.* of the Ordinance No. 12 of 1840 is 'explained to the Assessors, and they are 'called on to state if the defendants have prov- 'ed to their satisfaction, that they (the defend- 'ants) have within the last 20 years paid 'such customary taxes, &c., on the land in 'dispute, as are paid on similar lands, the pro- 'perty of private individuals, within the same 'District.

'The Singhalese document filled by the de- 'fendants dated 28th *March* 1792, is also put 'into their hands, and they are asked if that 'Deed can be construed into an absolute Grant 'of the Villages or lands mentioned therein.

'The Assessors not understanding either 'Dutch or English, cannot be expected to give

'any opinion of the Dutch Deed, or its Eng-'lish translation, also filed by defendants.

'The Assessors state that the Singhalese 'document placed in their hands appears to be 'a *Sannas* in favor of the *Chaliahs* of Katupiti 'Madampe, and that allusion is made therein 'to another *Sannas* of the 20th *January* 1767.

'They say that with regard to payment of 'taxes, it has been proved that defendants have 'paid but one-tenth on the land in question, 'and that such appears to have been the rate 'of tax paid by private parties in the same 'District, and that their opinion is altogether 'in favour of the defendants' claim.

'The District Judge, as far as he can form 'any opinion from so imperfect a translation 'as that produced, does not regard the Dutch 'Deed as an absolute Grant of lands. It is 'headed '*Extract from the Resolutions of 'Council held on the 20th September* 1766'; and 'at the foot it is set forth as a mere copy from 'the Dutch Records, and signed as such by the 'person who kept such Records. That is the 'only signature it bears. The Resolution come 'to appears to have been to reserve certain lands 'in the Chilaw District for such *Chaliahs* 'as might return to that part of the country 'from the Kandyan territories, to which it 'would appear that many *Chaliahs* had fled. 'The carrying of that Resolution into effect, was 'contingent on the return of such *Chaliahs*, 'and could only be adopted with regard to 'those *Chaliahs* as actually did return.

'The Singhalese document alludes to ano-'ther *Sannas* of the 20th *January* 1767, (which 'is not before the Court, the Dutch Deed be-'ing dated 20th *September* 1766) but does not 'appear to the District Judge to convey an 'absolute title to lands.

'With regard to the taxes paid, it appears to 'the District Judge, from the evidence, that 'all Cheenas, whether cleared with or without

Collective Court.

Queen's Advocate v. Mendis and others.

'permission of Government, pay the same rate 'of duty, namely, one-tenth to Government, 'in the Chilaw District.

'Such being the opinion of the District 'Judge, it is ordered that the defendants give 'up peaceable possession of the land called '*Galeheteyawe* to the Crown, together with all 'crops and immoveable property standing there- 'on, and that they pay the costs of the Informa- 'tion.'

The defendants appealed on several grounds, and the case was reserved for collective decision.

R. Morgan, (*Advocate*), appeared for the appellants, but the Court thought it unnecessary to hear him, and the D. Q. A. (*Selby*) left the case in their lordship's hands.

Per Curiam:—*Set aside* with costs. 'The 'Supreme Court is clearly of opinion that this 'is not a case for the summary proceedings under 'the Ordinance No. 12 of 1840, and that the D. 'C. ought not to have made any order therein 'against the defendants to deliver up possession 'of the lands mentioned in the Information, 'because the proof of the long cultivation thereof 'by the defendants, and the payment of the tax 'of one-tenth for the same, according to the rate 'payable on private lands, and also the old 'Deeds adduced in their favor, sufficiently shew 'such a *primâ facie* title in the defendants, as 'amounts to a 'probable claim or pretence of 'title,' under the Ordinance. The District 'Judge, moreover, ought not thereon to have 'proceeded to decide under these summary pro- 'ceedings, whether upon the true construction 'of an old deed, apparently genuine, and where 'possession has accompanied it, the original 'Grant was absolute or conditional only, and 'whether any condition contained therein had 'been since duly fulfilled or not by the 'grantees,'—[No. $\frac{1,879.}{11,388.}$ *D. C. Negombo.*]

Markair v. *Simon.*

The son of Moorish parents entitled to sue, on his attaining his sixteenth year where he trades on his account, separately, with the knowledge of his parents; though he continues to reside with them.

The Mohamedan and not the Dutch Law should govern such a case.

6th January, 1847. (C. S. T.)

1002—*M. L. Odooma Lebbe Markair v. B. Simon*

[From 'Murray's Reports,' pp. 75—76.]

This was an action for goods sold and delivered. On the day of trial, it transpired that the plaintiff was only nineteen years of age and unmarried; and that he lived with his parents, though he carried on trade in separate premises on his own account. The defendant urged that plaintiff, being a minor, could not maintain the suit without the consent and assistance of his guardians.

The District Judge was of opinion that according to the Dutch Civil Law, minors (that is those under 25 years of age), could not appear without the consent and assistance of their guardians, and (the Assessors concurring) the plaintiff was nonsuited.

The plaintiff appealed on several grounds: (1). That the objection came too late. (2). That the objection, if valid, did not warrant a nonsuit; but that the guardians should have been allowed to appear. (3). That though a minor could not be sued but through his guardians; yet a minor could maintain a suit on a contract advantageous to his own interests. (4.) That plaintiff was a trader, and transacted business on his own account.

The Circuit Judge *affirmed* the Decree, subject to the opinion of the Collective Court whether the age of majority should be reckoned according to the Dutch or Mohamedan Law.

The Collective Court *set aside* the Decree, and remanded the case for hearing and evidence *de novo*.

Per Curiam :—'According to the Moorish 'Law the age of majority is after the expiration 'of, or at the completion of the *sixteenth* year. '(*Hedaiya*, Vol. iii. p. 482; *MacNaughten's* '*Moh. Law*, ch. 8., p. 62.), and by the Dutch 'Law the parental power ceases by tacit or in-'direct emancipation, when the children with

Collective Court.

Markair v. *Simon.*

'the previous knowledge of the parents, take 'up a residence elsewhere, and exercise openly 'any trade or calling.' (*Vanderlinden. p.* 96, and *Voet*, lib. 1, tit. 7—12).

'As the plaintiff appears to be 19 years of 'age, and is openly carrying on trade in a 'separate house of his brother's on his own 'account, with the knowledge of his parents, 'the Supreme Court thinks he must be deem-'ed to be no longer under the parental power, 'and that although he has continued to reside 'with his parents, that circumstance alone 'affords in this Island, no reasonable presump-'tion to the contrary, in the case of a young 'Moorman who has already attained his full 'age of majority according to his own laws, and 'is trading *separatim* on his own account; 'because the custom of the Moors and Natives 'in this Colony, is for the whole family to con-'tinue thus to reside together in the same 'house until the marriage of the children, and 'even after wards.'—[No. 18,238. *D. C. Galle.*]

1003.—*Sekady Marcar* v. *Tamona Lebbe* and another.

Case lying dormant in Appeal, ordered to be struck off the List.

This case having lain dormant since the year 1841, and no party appearing in support of the Appeal, and the 1st defendant being reported by the Registrar to be dead, it was ordered that the case be struck off the List of Appeals, and be returned to the Court below. [*No,* 21,876, *D. C. Colombo.*]

December 4th. (C. S. T.)

1004.—*The Queen* v. *Harmanis*, convicted of Forgery at Caltura.

Queen v. *Harmanis.*

Surplusage in an Indictment may be rejected. Technical ob-

It is adjudged that the motion in arrest of Judgment be over-ruled, and that the Indictment is sufficiently supported by the evidence adduced. It appears that the words "*Notarial Instrument*" occur before the purport of the instrument is set out, and being matter of in-

Collective Court.

Queen v. *Harmanis.*

jections valid in England are not equally allowable here.

ducement, the record would have, in England, been ordered to have been amended by striking out the word "*Notarial*", (2. *Russell on Crimes* p 798-9, and note 9;) and whenever such amendment is allowed, the Supreme Court would reject the words as surplusage; as although the Court has by its rule of the 6th *December* 1845 ordered that no objection shall lie to the form of any Information in any case where such objection would not be allowed by the Law of England upon any Indictment, it has never gone on to further declare that all objections which are valid by the Law or practice of England, shall be equally allowed here. On the contrary the Supreme Court has always mainly looked on such technical objections, to see whether the Information stated the offence with sufficient clearness and certainty, for the Prisoner to know the crime with which he was charged, and to be able to make his defence to it; and in this case the Information can leave no doubt as to the nature of the instrument, viz, that it purported to be a Deed of Sale of the garden mentioned therein, but was incomplete for want of the due attestation of a Notary, the gist of the offence laid therein being that the Prisoner, in his office of Notary, had fradulently omitted to seal and sign such Deed of Sale. [*No.* 6, *Crown Case Reserved.*]

December 11*th*, (C. S. T.)

1005.—*Weygale*, widow. v. *Chinnetamby*.

Weygale v. *Chinnetamby.*

In this case the Decree of the Court below was *set aside*, and the case remanded for further enquiry and Judgment *de novo*.

Per Curiam.—It is very probable, for the reasons ably stated by the District Judge, that the parties in framing the instrument did not intend to restrict the first and second defendants from disposing of the garden by mortgage or sale only; but if the Court were bound to look to the deed alone, it could not possibly hold that the

Collective Court.

Weygale v. Chinnetamby.

legal effect of the express prohibition therein against mortgaging or selling, extended also to debar the donees from making any gift, exchange, or other alienation of the said garden. On the contrary the Supreme Court would incline to consider that in an ordinary Grant, the condition would be wholly void as annexed to an absolute gift; but as the document on the face of it is a gift or dowry, another independent question must necessarily arise thereon, which may affect the transfer of this garden between the defendants, viz; whether by the general customary Law of dowry, prevailing at *Batticaloa*, the husband cannot even with the consent of his wife give away the *whole* of her dowry property to the sister of the husband? And also if a married couple die childless, the dowry property does not by such Law devolve on the donors or their heirs?

This Court has on a previous occasion, in reference to the wife's property, had to notice the analogy between the *Thesewaleme* or customary laws of the Malabars at *Jaffna*, and the customs prevailing at *Batticaloa*, and has referred the case back accordingly for enquiry as to the latter. (Appeal *No.* 2912 *D. C. Batticaloa*, 11th November 1835,* and *Marshall's Digest*, pp. 224; 94, and 222); and believing, as the Supreme Court does, that the decision of the District Court has met the real Justice of the case, it is only desirous to have such decree established on its proper legal grounds. [*No.* 10,443, *D. C. Batticaloa.*]

December 29th. (C. S. T.)

1006—*Don Abraham v. Totie Unnanse.*

Abraham v. Unnanse.

The Judgment of the Police Court is *set aside*. The 2nd clause of the Ordinance in question provides that, whenever the Governor

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* Vide *Morgan's Digest*, p. 62, par. 2 67

Collective Court.

Abraham v. Unnanse.

shall declare by Proclamation that a Police Force shall be established within any town and limits specified in such Proclamation, the Ordinance shall come into operation *therein* ; the Supreme Court is therefore of opinion that as *Galkisse* is not within such specified limits, the 36th clause of the Ordinance, on which the prosecution is founded, cannot be held to have come into operation therein.

The Acting Senior Puisne Justice (Mr. *Stark*) dissents, being of opinion from the 56th clause of the Ordinance No. 13 of 1843, and the 1st clause of the present Ordinance, that these Ordinances respectively were intended to have operation *immediately* and universally, except as respects the Police Force of the towns and limits mentioned therein, and the clause under consideration has no reference to such Police Force. [No. 9153, *P. C. Colombo.*]

1007.—*Perera v. Dias* and another :

Perera v. Dias.

The Petition of the second defendant, praying for leave to appeal from the Judgment of Court below in this case, is rejected.

The Judgment of the District Court sought to be appealed from in this case was pronounced on the 30th *April* 1841, and an appeal was lodged against it by the defendants; but that appeal was withdrawn by the defendant's Proctor on the 31st *December* in that year, and the present application was not made until after the lapse of more than six years and a half, after the withdrawal of the first appeal. The only ground on which this application is founded is a mistake in Law in the Judgment, and it is not alleged that there has been any fraud in this case, or that any evidence has been discovered since it was decided, and the Plaintiff, who was a purchaser, completed the transfer of the property in question after the action was brought.

It may also be urged that although the general Law is, as stated in the opinion of the

Advocate for the Petitioner, yet there are cases shewing that agreements restricting redemption to time certain, are good if between *members of the same family*, as the mortgagor might thus intend to benefit the mortgagee. (*Benham v. Newcomb* 2 Vent, 364; 1 *Powell*, *Mortg*: 128.)

1008.—*King v. Hamilton.*

King v. Hamilton.

Judgment. The proceedings in this case having been read:—It is ordered, with the consent of the Counsel on both sides, that this case be remanded to be heard at the ensuing sessions for the Midland Circuit. It appears from *Armour's Digest*, tit: *Lat Himi*, that the Kandyan Law is not silent on the point stated to be material in this case, and it may possible be requisite to take further evidence as to the custom thereon; under these circumstances the general question on which the case has been reserved for Collective decision, viz; "*As to what Law ought to prevail in the absence of any Kandyan Law upon the subject*," does not at present arise in the case. [No. 20,194. *D. C. Kandy.*]

APPENDIX.

IN APPEAL FROM THE C. R. OF COLOMBO.

No. 18859.

B. R. ADOLPHUS.........*Plaintiff and Appellant.*

Versus.

SANGERELINGAM KANNEN and another......*Defendants and Respondents.*

Appendix A.
Adolphus.
v.
Sangerelingam
and another.
1862.

The defendants were Managers of a *Cheetoo Club,* and as such managers were alleged to hold in their hands the sum of £7 being the stakes of a lottery, which had fallen to one *P. Canden*. These stakes were seized under the writ No. 9388 issued against the "Houses, Lands, Goods, Debts, and *Credits,*" of the said *P. Canden* at the instaoce of one *John Henry Perera,* and sold by the Fiscal; they were purchased by plaintiff who brought his action on the Fiscal's assignment.

1st defendant examined, states,—"I am a member of a certain *Cheetoo Club.* There were 158 *Cheetoos* (or Tickets) at 5s each. After the number of subscribers is complete, and the sum for each Ticket paid, the drawing commences; it takes place twice a month. At each drawing some one of the subscribers gains the prize, which entitles him to the whole amount subscribed. The subscribers again (including the one who won the prize) pay down 5s each for a Ticket, and another drawing takes place. In this way the subscription continues, and prizes are drawn, until each cheetoo-holder has gained a prize. If, for instance, there be 20 members paying £1 each, some person at each drawing gains a prize of £20. No prize in favor of *Pamben Canden* turned up, the club having ceased to exist before his turn came round."

Appendix A.

Adolphus.
v.
Sangerelingam.
1862.

JUDGMENT (per *C. H. de Saram* Commissioner): "It would appear that one *Pamben Canden* was a subscriber to what is called by the natives a *Cheetoo Club*. It is clear from the statements of the defendants to the Fiscal's Officer (plaintiff's 1st witness) that *Pamben Canden* had paid £7 into their hands being his subscriptions to their club. We all know what a *Cheetoo Club* is, and that it is just what the first defendant has described it to be. It has therefore clearly for its object an undertaking in the nature of a lottery, and, as such, prohibited under a penalty by *Ord.* 4 of 1844. The contract between all the parties connected with such a club, is consequently void by statute, and the plaintiff, being in the shoes of *Pamben Canden* one of the members, is in no better position, and is precluded from obtaining relief.

The claim is dismissed; each party to bear his own costs.

IN APPEAL (*per Curiam*) *affirmed.* This is clearly a case of an illegal lottery.

IN APPEAL FROM D. C. OF COLOMBO.

No. 38134.

Edmund Collier Jr. Agent and Attorney of H. J. Albrecht, trading in Ceylon as C. D. PARLETT and Co. *Plaintiff and Appellant.*

Vs.

TEAGAPPA CHETTY, *Defendant and Respondent.*

Appendix B.

Collier.
v.
Teagappa.
1847.

Collier, as above described, sought to recover from defendant £286, 19. 7 as balance remaining due to *C. D. Parlett and Co.*, for the price and value of two Bengal Government Bills of Exchange sold and delivered by that firm to defendant, on the 22nd March 1841. The defendant pleaded in abatement another action (No. 33125) pending against him for the same claim, at the instance of *F. Lambe*, as the then Factor of *C. D. Parlett and Co.* At the trial

plaintiff admitted that the cause of action in both cases was the same.

It appeared that *Lambe* was for some time manager for *C. D. Parlett and Co.* The partners then were *Albrecht* in England, and *Parlett* in Ceylon. When *Parlett* was temporarily absent from the Island, *Lambe* did the business by procuration. After *Parlett's* death in March 1840, *Albrecht*, then in England sent a Power to *Lambe* authorizing him to wind up the affairs of the firm, and giving him the general superintendence and management of the new business to be carried in Ceylon by *Albrecht* on his own account, as *C. D. Parlett* and *Co.* The Power authorized *Lambe* (*inter alia*) "to commence, prosecute, defend, discontinue, compromise and settle any actions suits or other legal proceedings", relating to the now firm, and to "use the name of the said *Henry James Albrecht* for these purposes." Under this Power *Lambe* acted, and in negotiating Bills and managing other transactions, *Lambe* signed "*C. D. Parlett* and *Co.*" *Albrecht* who came to Ceylon in January 1841 was present on 22nd March 1841 along with *Lambe* at the sale of the Bills of Exchange in question, which was for the behoof solely of *C. D. P. and Co*, and was so entered in their books. The Bills bore the endorsation "C. D. Parlett & Co."

On the 14th April therealter, *Lambe* instituted, in his own individual name, the suit No. 33125 against the present deft; no mention was made by *Lambe* in the Libel of his constituents, *C. D. P. and Co*, although the Proctor's original authority to institute that suit was a letter signed "C. D. Parlett and Co." in the handwriting of *Lambe*. On the 11th *May* 1841, *Lambe* ceased to conduct, and *Albrecht* took the sole management of, the business. A letter was put in evidence dated 24th *Feb.* 1842 signed "C. D. Parlett and Co." addressed to the Proctor who instituted the suit No. 33125; it was in the handwriting of *Thompson* the then Agent of the firm, and after referring to this

and other cases, proceeded: "For these suits we request to receive from you a written acknowledgement that you consider yourself as proceeding solely on our account, and that you undertake to pay over to us such sums as you may recover in respect of them." It did not appear what reply, if any, was made to this letter. Another letter was offered in evidence by Plaintiff from *Lambe* to *Albrecht*, relating to the capacity in which *Lambe* acted for the firm; but the *D. J.* rejected the evidence, on the ground that it was a private letter, and that *Lambe* and *Albrecht* might be colluding against the Defendant.

Judgment of the D. C. (29th *July* 1845.) "The defendant has pleaded in abatement that another suit was pending for the same cause when this action was commenced, wherein, *Frederick Lambe* the then factor of *C. D. P. and Co.* was Plaintiff. Upon this plea issue is taken. It is admitted by Plaintiff, (*Collier*,) that the cause of action is the same; but it is contended, that although *Lambe*, the Plaintiff in the former suit, was in the employ of the firm, it was not in such situation as to entitle him to maintain an action in his own name, as he has done; and that, consequently the firm is not to be debarred from maintaining this action.

This must be held a good plea if *Lambe* did, when he commenced the action, stand in such a relation to the firm as to entitle him to maintain actions, in which the firm was concerned, in his own name. The point, therefore, for consideration is, whether *Lambe* did stand in such relation, and in order to ascertain this, let us see first, whether he stood in such a relative position, as to be personally liable upon contracts entered into with him for the benefit of the firm.

"It is quite clear that a party is personally responsible, if he does not disclose the fact of his Agency. (*Story's Agency* p. 228.) But here it may be said that an Agency was disclosed as

the Bills were endorsed 'C. D. Parlett and Co.' It is true that this does disclose the fact of *Lambe* being an agent, but is it disclosed to whom he was such agent ?—it being a well known fact that *C. D. Parlett* had been dead some years. But if a contract is entered into by an Agent who is known to be such, and acting in that character, but the name of the principal is not disclosed, the same principle applies, and the Agent is held responsible ; and until such disclosure, it cannot be supposed that the contracting party would have entered into a contract, exonerating the Agent, and trusting to an unknown principal. who might be insolvent or incapable of binding himself (*Story's Agency*. p 229.)

"I think therefore *Lambe* did stand in such a position as to make him personally liable upon contracts entered into by him on behalf of the said firm.

"The next point then comes, whether he could sue in his own name. Now, independently of the principle that he who can be sued can also sue, on the same subject matter ; considering that the contract in this case, if such it may be called, was made with *Lambe* for *C. D. P. & Co*, and that the name of *Parlett* is fictitious ; that the name of the real party concerned, namely *Albrecht* does not appear throughout the transaction ; and moreover that he was not generally known to be the principal of the firm, and did not usually reside in the Island, I think that *Lambe* could well institute the action No 33125, and that the plea pleaded in this suit must be held good. It is accordingly decreed that the Defendant be absolved from the instance with Costs. Assessors concur."

From this decision the Plaintiff appealed on two grounds : (1) that the Court below rejected evidence whereby the true position of *Lambe* with *C. D. Parlett and Co* would have appeared ; and (2) that a Broker was not by Law permitted to sue in his own name, and without reference to the name of his principal.

Appendix B.
Collier v. Teagappa. 1847.

Selby D. Q. A., for appellant, was stopped by the Court—the Acting Chief Justice (Mr. *Carr*) observing "I am with you Mr. *Selby*."

Stewart D. to Q. A. was about to address the Court for Respondent, when *Selby* objected on the ground that defendant had left the Island and was not represented in Court by a Proctor, though the case had stood over for 6 months for filing proxy. The C. J. decided to hear the Respondent's Counsel.

Stewart. The defendant ought not to be harassed with two actions. *Lambe* had a *special property* in the Bills and could therefore sue in his own name. (*Story's Agency*. p. 29.) The firm of *Parlett and Co* was not a *known* principal, and *Lambe* was also a *foreign* Agent, and therefore on both grounds *Lambe* might sue in his own name. Plaintiff (*Albrecht*) might have have *intervened* in such a suit, but could not maintain a separate action for the same debt, *as the factor and principal were the same party*, inasmuch as the defendant could have set off against the factor's claim a debt due to the defendant by the principal.

Chief Justice. Plaintiff ought to have *intervened* in the former suit, and he not having done so, the two suits should be *consolidated*, and the plaintiff pay the additional costs.

Selby. His view of the case was different from that expressed by the Court. Admitting *Lambe* to have been a factor and entitled to sue in his own name, it did not follow that he and his principal were, therefore, *the same party*. Though for some purposes they might be so considered, they were not for all purposes identical. No judgment against *Lambe* could have been executed against the property of the firm. The admission that *Albrecht* could and ought to have intervened, established the fact that he was not identical with *Lambe*, for he (*Albrecht*) was already a party to the suit, and every intervention must be by *a third party*. That *Albrecht* could have intervened in that suit was true, for he could have said to defendant, this money

though sued for by, is not due to, *Lambe* (the plaintiff) but to *Parlett and Co.*; whilst *Lambe* on the other hand might have denied such allegation, or set up a *lien* in his own favor on the bills. As *Lambe* and the firm might thus have *adverse* interests, they could not be considered identical; and if not, the defendant could not maintain his plea of *lis pendens*, which must be *where the parties on the Record to both suits are the same persons:* nor could the Court *consolidate* two suits between different parties. (*Voet.* 44. 2. 7.; *Cens. For.* part. 2. *lib.* 1. *tit* xxvi, and 6. *Kersteman*, 93.) Had *Lambe* sued as the Agent of *C. D. P. and Co.*, the firm could not have brought a separate action until the former suit had been discontinued; but he does not sue as an Agent, but in his own right and in his own name, and the proxy is signed by him in his own name, and not as an Attorney. (Paley, *Principal and Agent* p. 180. *Story's Agency*, p. 118. 2 *East* 142.)

Per Carr C. J. (25th *March* 1847.) "It is considered and adjudged that the Decree of the *D. C.* of *Colombo* of the 29th *July* 1848, be amended by the plea being over-ruled with costs, and by its being ordered that the present suit, and the suit No. 33125, be consolidated, when the Court can, at the trial thereof, decide on the respective liabilities of the parties to pay the costs in such suit.

"The S. C. thinks that the plaintiff ought to have intervened in the former suit, and that the relative rights of the parties could have been fully and well settled by the Court upon the plaintiff's intervention therein, in lieu of his harassing the defendant with this separate suit; so far, therefore, as the suit may appear to have wrongly occasioned further litigation and expense, the plaintiff should be made, on the final decree, to bear the costs thereof. The S. C. does not consider, on the facts disclosed, that *Lambe* can be considered as a Factor, or as having any right in himself to institute the first action in his own name, nor can the S. C. say

Appendix B

Collier v. *Teagappa* 1847.

how far the same was ratified by the letter from the plaintiff's Attorney to Mr. *Beling*, (the Proctor) without knowing what answer was sent to it.

The whole case must be viewed in the nature of a Bill of Interpleader (*Drinkwater* v. *Goodwin* Cowp. *R.* 251, 255.), which is stated to be similar in some measure to the *tertius interveniens* of the Civil Law. (*Mad.* 239.) and wherein the separate claimants can be compelled by the Court to interplead, so that the Court may adjudge to whom the debt is due, and the third persons applying for relief be indemnified and protected against their separate actions, if they have commenced the same." [*Murray's Reports*, (Sessions, 1847.) pp. 92—98.]

IN APPEAL FROM D. C. OF COLOMBO.

No. 11,176.

LIVERA (*widow*) ....*Plaintiff and Appellant.*

Versus.

DOMIMGO PERIS...*Defendant and Respondant.*

Appendix C.

Livera v. *Pieris* 1847.

The suit was instituted against defendant as executor of *Bastian Fernando Lekame* deceased, to recover the sum of £5. 12. 6 alleged to have been borrowed and received by the said *B. F. Lekame*, from the Plaintiff's late husband, on a Bond dated the 5th May 1832. Land mortgaged by the Bond was to be possessed by mortgagee in lieu of interest ; and the Bond contained a mutual stipulation, not to foreclose, or redeem, the mortgage till after the lapse of 5 years. It was alleged that the mortgagee entered into possession of the land on the execution of the Bond, and that after his death, which happened about two years subsequently, his widow, the Plaintiff, continued and was at the institution of the suit, in possession under the mortgage.

See Morgan's *Digest*, p 2, and Beling's *Digest*, p. 281.

Appendix C.

Livera v. *Pieris* 1847.

The Defendant denied the execution of the Bond, and pleaded the 3rd *cl.* of the *Prescription Ordinance*, No. 8 1834.

It appeared at the Trial, from the examination of the Plaintiff, that her husband's brother, who was living, was administrator of the deceased's Estate, that the Estate had been long wound up, and the accounts of the administrator closed. On this admission Defendant moved that Plaintiff be nonsuited, as the administrator was the proper party to bring the action; but the *D. J.* over ruled this objection, and refused the motion. It also appeared, from the Inventory of the Estate lodged in Court by the administrator, that the sum sued for in this action was not included therein, nor was there any reference whatever made to it. The Plaintiff proved the Bond and adduced evidence of possession of land as alleged,

The *D. J.* pronounced the following judgment (19*th October* 1846) : "The Inventory filed in the Testamentary case No. 405, makes no allusion whatever to the mortgage in question. which the Court presumes it would have done, had the amount been still really due at the time. The Estate of plaintiff's late husband was closed in *April* 1848 in the late *D. C.* of *Negombo*, and she commenced this action in 1845. The evidence adduced being unsatisfactory, and the testimony of the witnesses as to the plaintiff's possession not altogether to be depended on, it is decreed, the assessors concurring, that this case be dismissed. Defendant is absolved from the instance with Costs." The plaintiff appealed on various grounds.

Advocate R. Morgan, (for Appellant.) The mortgage Bond was satisfactorily proved—and this was the only matter put in issue by defendant. The Judgment of the D. C. proceeded on the assumption that the debt was not due at the time the Inventory was filed, that is to say, that it had had discharged before that time —an assumption which the Court was not jus-

Appendix C.

Livera
v.
Peris.
1847.

tified in acting upon, as the defendant had not pleaded payment, but *non est factum*; and because, in point of fact, no reasonable ground existed to justify such assumption. Nothing was more common than such omissions in inventories, which were attributable to ignorance or inadvertence on the part of administrators. Had the proper issue been taken, and the plaintiff allowed an opportunity of doing so, she would have been able to explain, satisfactorily, the reason of such omission. No such opportunity was afforded her in the D. C. The only issue was the execution of the Bond, and that was satisfactorily established. As to the difficulty suggested by the Court whether owing to the condition of the Bond the action was maintainable—that condition did not prevent this action, because (1) the correct meaniug of the Bond was that the restriction was not perpetual, but only to last for five years: (2) Even if a perpetual restriction existed it would be bad in law. An agreement taking away the right of the creditor to enforce payment, and leaving it to the debtor to pay when he pleased, was illegal, and would not be upheld. (Story's *Equity Jurisp* : § 1009, and I *Domat*, Ch. iii, *tit* 1. *sec* 3, *art*, 9,10.) (3) Allowing the agreement to be good and valid, yet, where in the case of an antichresis, a debtor unlawfully usurped possession of the land, instead of allowing the creditor to enjoy it lieu of interest,it would be competent to the creditor to bring either a hypothecary action for the recovery of the money, or an action to be quieted in possession of the land. The Rule is laid down in Voet. (*De pign. et hypothec tit* 1, *sec* 23.)

Per Carr A. C. J. (*25th March* 1847) : "It is considered and adjudged that the decree of D. C. of *Colombo* be *set aside* and the case remanded for re-hearing on further evidence, with liberty to the parties to amend their present lists of witnesses, and for the D. C. to give judgment *de novo*. Costs to abide result.

"It has been urged by appellant's counsel that omissions in the Inventories of Administrators, are not unfrequent, and do not, accordingly, deserve the weight attached by the D. C. to their omission ; but in the present instance, the accounts of the administrator at least ought to have mentioned somewhere in them the mortgage, as the administrator has closed his accounts, and the plaintiff who is the widow of the Intestate, alleged that the administrator delivered it (the land or mortgage) over to her at the closing of the Estate. The administrator ought therefore to be made a witness, and examined to explain this omission. The plaintiff appears moreover to have made out a *primà facie* case to call for the defence, and the evidence in reply".—[*Murray's Reports. pp.* 84—87.]

INDEX.

	Page.	Par.
ABSENCE of a party to a suit	24.	113.
on Trial day.	36.	162.
of Proctor.	38.	169.
of Proctor no ground for postponement unless unavoidably absent.	54.	227
of material witnesses. Postponements on account of the, ...	69.	291.
of Defendant. Necessary postponement. *Exparte* hearing on, ...	100.	403.
of Counsel or Agent may be a ground for a postponement.	186.	528.
of a party is not in all cases a good ground for postponement. The, ...	192.	531.
, the S. C. directed the Proctor to pay the batta of the witnesses. On a postponement in consequence of a Proctor's, ...	295.	644.
Practice in cases where plaintiff in unavoidably absent on the day of Trial.	340.	727
ACTION to recover money due and unpaid.	43.	190.
Cause of,. Disputing Plaintiff's title.	*ib.*	192.
by Executor for money belonging to third parties.	69.	288.
againt Executor of an Administrator. ...	88.	363.
against married woman.	102.	412.
Double, for land and for mesne profits.	107.	426.
on a deed which had been proved to be a forgery and cancelled.	133.	454.
on an agreement respecting Pearl Fishery. ...	137.	463.
for the cancellation of the Banns of Marriage. Answer to the action.	206.	549.
for breach of covenant.	227.	563.
The proxy of one of several partners is sufficient to authorize an, ...	240.	578

	Page.	Par.
ACTION. Where a debtor of a firm granted a bond to one of the partners and the other partner, after a subsequent dissolution of the partnership sued the debtor, *Held* that the Plaintiff had, no right of, ...	241.	581.
No, lies against a Surgeon for having ordered out the plaintiff from a room in which the former was performing his duties as Vaccinator.	241.	585.
for the restitution of money actually paid. Evidence.	263.	612.
No, is maintainable on a Lottery ticket. ...	271.	616.
An, does not lie for including property in an Inventory.	317.	680.
is commenced. Costs of a previous action must be paid before a new, ...	320.	687.
Where Sureties have been illegally proceeded against their remedy is by, ...	328.	709.
against Auctioneer.	331.	717.
ACCOUNT will be opened upon proof of error or oppression. A settled.	315.	677.
ACCORD and SATISFACTION how pleaded and proved. ...	280.	624.
ACKNOWLEDGMENT of trust.	4.	16.
of a balance is collateral evidence of what the balance is. Written, ...	70.	293
of title. Possession. Presumption in favor of heir.	87.	360.
ADMINISTRATION to widow.	15.	74.
Want of, ...	*ib.*	76.
Preferent right to, ...	35.	157.
Failing to tender security.	37.	168.
Prescription against Letters of, ...	47.	206.
A party when precluded from questioning necessity for, ...	*ib.*	*ib.*
Agreement of widow previous to, ...	48.	210.
of deceased wife's estate. Second marriage.	52.	223.
pending the suit.	53.	225.
Right to, ...	65.	279.
refused to a Buddhist Priest	66.	283.
of a widow.	90.	368.
to a widow. Proof of marriage. ...	94.	385

		Page.	Par.
ADMINISTRATION.	Parties dying abroad.	94.	386.
	refused to the widow.	96.	397.
	to deceased wife's estate.	114.	439.
	to creditor with consent of Executor. ...	181.	520.
	cannot be refused at any period after the death of an intestate. *Qu?* How far it may affect a division already made among the heirs.	235.	569.
	was unable to furnish security, but was the sole next to the deceased, the Court directed a limited grant. Where it appeared that the applicant for, ...	266.	614.
	rejected, where it appeared that the deceased had died about 50 years ago, and the property been divided amongst the heirs. Application for, ...	285.	633.
	It is only in extreme cases, the Court would prefer the Secretary to the next of kin.	307.	665.
	A partition decreed in the course of, ...	319.	684.
ADMINISTRATOR.	Defence as, ...	44.	192.
	Costs against, for a false plea. ...	71.	295.
	Adopted children joined as, ...	73.	304.
	Action against the Executor of an, ...	88.	363.
	Neglect of, how far excused. ...	161.	503.
	An, is at liberty to alienate or encumber the whole estate entrusted to him. ...	252.	594.
	The existence of other debts is no answer to a creditors suit against an, ...	314.	676.
	, except on a regular application. The Court will not interfere with the proceedings of an, ...	326.	703.
	for his share. One of several co-heirs may sue the, ...	343.	734.
ADMINISTRATRIX	when sued for funcral expences after account is filed.	39.	176.
ADOPTED	children joined as Administrators... ...	73.	304.
ADVOCATE.	A judge previously engaged as, in the cause ...	95.	388.

	Page.	Par.
ADMISSION. Retraction of, ...	3.	15
of debt.	37.	166.
by Defendant.	73.	105.
of part payment.	79.	330.
without tender. Costs.	92.	373.
made as a witness in a former action. ...	96.	394.
of the debt. Prescription not pleadable after, .	143	473.
of a party should be taken entire. ...	161.	502.
of a party how far binding.	168.	509.
A parol, is sufficient under the proviso in the 7th Clause of the Prescription Ordinance. ...	253.	597.
of one co-defendant does not bind another if they put in separate answers. The	256.	601.
in an Answer do not operate as an estoppel, except in certain cases, and may be explained by evidence.	260.	607.
ADVERSE title. Meaning of term. Prescription... ...	20.	103.
Possession.	71.	298.
A party claiming title by prescription, if proved to have been originally a mere cultivator is bound to shew when his title became, ...	187.	529.
to the other. The possession of a joint heir is not,.	271.	618.
after the lapse of the period fixed for redemption. Ten years possession will give him a title by prescription. Possession of mortgagee becomes,...	281.	625.
Possession. Compensation for building and planting.	312.	673.
AGENT payment to, ...	13.	65.
Proctor's, ...	79.	329.
Breach of contract. Principal and	148.	483.
when not personally liable.	149.	*ib.*
standing security for his Principal	152.	*ib.*
for share in the profits. Stipulation by, ..	156.	494.
Where a party appears by Attorney, the D. C. may require the presence of the party. ..	324.	696.
An Attorney cannot sue, unless expressly authorized.	345.	738.
AGREEMENT misnamed.	9.	134.

		Page.	Par.
AGREEMENT	of Widow previous to administration. ..	48.	210.
	Non-acceptance no, ...	80.	332.
	respecting Pearl Fishery. Action on an, ..	137.	463.
	may be presumed though the defendant has not signed it. Mutuality on an, ..	139.	ib..
	for transfer of land. Waiver of, ..	143.	475.
	and that one of the conditions thereof had been broken by the Plaintiff, but refused to produce the agreement, the Court entered up judgment for the Plaintiff. In an action for work and labour, where the Defendant pleaded a Written, ...	240,	579.
ALTERATION	of a decree	111.	428.
	of a clerical error in a decree.. ..	115.	443.
ALIENATION.	.. .. ..	12.	59.
	Service Parveny	52.	222.
	of Service Parveny lands. Effect of Reg: No. 8 of 1809.	247.	587.
	of Service Parveny lands. Effect of Reg: No. 8 of 1809.	255.	600.
AMENDMENT	of Libel	72.	303.
	of Libel a fresh summons ought to issue. On,	334,	721.
	Motion to amend must be on cause shewn ..	341.	729.
ANSWER.	General Denial.	62.	269.
	Statements in the separate answers of Defendants do not prejudice each other.	93.	381.
	but stated no special circumstances in support of his prayer, the Court refused leave. When after a general denial the Defendant prayed for leave to, ...	231.	565.
APPROPRIATION	of payments.	83.	347.
APPRAISEMENT	of a Temple.	95,	389.
	The Appraiser's fee is a charge on the Estate.	307.	664
APPEAL.	Revision.	8.	41.
	Security in, ...	31.	142.
	Objections during Trial.	44.	196.
	received by D. C. after lapse of time. Security in,	45.	198.

	Page.	Par.
APPEAL Judgment of S. C. binding on security in, ..	45.	199.
under Rule 5. Sect. 8. Merits.	46.	203.
after lapse of time..	ib.	200.
to Privy Council	47.	207.
to Privy Council	49.	212.
to Privy Council. Fresh evidence in Review before Supreme Court	50.	214.
to Privy Council. Value of the property ..	57.	240.
in formâ pauperis	66.	282.
in formâ pauperis. Provision as to future Costs.	74.	309.
to Privy Council may lie against a suit for a divorce.	97.	319.
False evidence no ground of, ...	85.	352.
Against Interlocutory Order.	ib.	355.
Trial pending Interlocutory, ...	96.	396.
Against a decree founded on evidence.	103.	415.
Res Judicata in the absence of, ...	141.	468.
A woman under coverture cannot, ...	186.	527.
. Grounds for a postponement. Discretion of the Court below open to revision in, ...	186.	528.
cannot be accepted after the appointed time, unless by consent. Security in, ...	194.	535.
The S. C. will decide on all Interlocutory Orders, with the assent of parties, and also in Criminal, ..	200.	539.
The S. C. will not alter a judgment where the party aggrieved thereby has not appealed. ...	202.	543.
. The appeal being frivolous the appellant was cast in double costs. Where a Judgment has been entered against a Defendant without notice, his remedy is not by, ...	243.	583.
to the S. C., and not by a fresh action. The remedy against any omission or defect in the Judgment of a D. C. is, ...	248.	589.
on the ground that the Appellant's witnesses were tampered with, ...	283.	629.
was owing to the adjournment of the D. C.. The course adopted where an Appellant's failure to. ..	285.	635.
The S. C. will under certain circumstances stay ex-		

	Page.	Par.
ecution pending, ...	237.	640.
APPEAL through ignorance, the S. C. allowed him to do so after the limited time. Where a party failed to give security in, ...	298.	649.
dispensed with where the property sequestered is sufficient to cover the judgment and costs. Security in, ...	307.	666.
Costs disallowed for improper language in the Petition of, ...	309.	670.
to Privy Council. Procedure on abandonment ..	318.	682.
to Privy Council. Procedure on abandonment ...	320.	688.
to Privy Council. Security in Appeal. ..	323.	690.
to Privy Council. Security in Appeal.	323	691.
to Privy Council. Procedure.	325.	697.
The S. C. refused to entertain an objection which was not made a ground of, ...	325.	699.
Joinder of parties ordered on, ...	326.	702.
to Privy Council. A surety dying the S. C. will accept another in his stead.	330.	713.
APPELLANT no ground for a new trial. Non-production of evidence by, ...	135.	456.
ARBITRATION.	3.	10.
Reference to, ...	18.	95.
Reference to, ...	31.	141.
Suitors cannot be forced to, ...	48.	209.
. Their signatures to such consent should appear on the proceedings. Reference by parties to a suit to, ...	50.	217.
Forms of reference to, ...	67.	286.
. Want of assent of the parties. ...	80.	335.
is void by death of one of the Arbitrators. A submission to, ...	154.	487.
Ambiguity on reference to, ...	158.	499.
cannot afterwards dissent from the decision, merely because it is against him. A party who has consented to a reference to, ...	252.	595.
ARBITRATOR. Report of the, ...	80.	335.

	Page.	Par
ARBITRATOR. A submission to arbitration is void by the death of one of the, ...	154.	487.
It is irregular for a D. J. to sit as an, ..	252.	595.
or Umpire. The D. J. cannot, without the consent of the parties, appoint an, ...	296.	645.
ARTICLES of WAR allow of an, action but do not permit execution.	238.	573.
ARREST. Qu ? Whether an, before the expiration of the period allowed for appeal would be a false arrest.	239.	576.
ASSESSORS.	17.	86.
Omission in the proceedings of the names of, ...	96.	395.
ASSENT to a sale of land	54.	229.
ASSIGNMENT of a debt...	70.	294.
ASWEDDUMIZED the land of another. Qu ? As to the rights of a party who has, ...	185.	525.
another's land with his assent. Right of a party who, ...	199.	538
ATTEMPT. Intention	14.	71.
ATTACHMENT against a Court Officer. ...	140.	464.
ATTESTING WITNESSES. Proof of a Bond. Comparison of Handwriting..	177.	515.
does not dispense with legal proof. The death of all the, ...	306.	663.
ATTENDANCE of parties and witnesses, the Court will in view of the customs of the country respect their feelings. In directing the, ...	238.	575.
AUTHORITY of a party to sue in behalf of another. ...	135.	455.
to act as *Curator ad litem.* ...	164.	507.
to act as *Curator ad litem.* ...	183.	523.
AUTHENTICITY of documents presumed.	178.	516.
AUCTIONEER is entitled to detain the purchase money till the transfer is completed. Payment of purchase money. An, ...	52.	221.
Liability of, ...	63.	272.
Action against, ...	331.	717
AWARD after their voluntary submission to Arbitration. Suitors cannot object to an, ...	48.	209.

	Page.	Par.
AWARD not signed by *all* the Arbitrators is void. An, ...	154.	487.
BATTICALOA. Liability of a wife at, ..	62.	267.
property acquired during coverture comes into community, and is under the sole control of the husband. In, ...	261.	610.
BANNS of MARRIAGE. Proceedings upon opposition to, ...	85.	354.
. Estate of a predeceased parents left unsettled.	182.	521.
. Answer to the action. Action for the cancellation of the, ...	206.	549.
BAILEE who is not to receive any renumeration for the custody of the property, is not bound to take that scrupulous care of it, which would otherwise be required of him. A, ...	241.	580.
BANKRUPTCY. Who are entitled to the custody of Letter Books of a bankrupt	249.	592.
The D. C. cannot take the initiative in any act connected with the, ...	*ib*	*ib*
BATTA of the witnesses. On a postponement in consequence of a Proctor's absence, the S. C. directed the Proctor to pay the, ...	295.	644.
Witnesses living 4 miles of the Court not entitled to,	328.	708.
BEQUEST. Verbal, ..	82.	344
Verbal, ...	101.	407.
Oral, of real and personal property. ..	175.	514.
BILL of EXCHANGE	12.	61.
BOND. Prescription.	4.	18.
by one Partner.	7.	34.
.. ..	12,	61.
Consideration and Variance of, ..	25,	62.
Misnamed.	29.	134.
Prescription against, ...	*ib*	*ib*
Proof of payment.	37.	164.
from creditor. Action to recover a paid, ...	*ib*	*ib*
Proof of payment.	79.	330.

	Page.	Par.
BOND. not passed before a Notary, Personal, .	103.	417.
. Prescription.	129.	446.
. Attesting witnesses. Comparison of Handwriting. Proof of a, ...	177.	515.
. Minor discrepancies in evidence. Authenticity of documents presumed. Comparision of Handwriting. Proof of a, ...	178.	516.
theCourt may decree interest, though not claimed in the Libel. Where the plaintiff proceeds on a Penal,	238.	574.
to one of the partners, and the other partner after subsequent d[illegible]n of partnership sued the debtor for the amount, *Held* that the plaintiff had no right of action. Where a debtor granted, ..	241.	581.
is not necessary, where a constructive delivery has been proved. Proof of actual delivery of the, ..	287.	640.
BUDDHIST PRIEST'S property	13.	62,
. Administration refused to a, ...	66.	283.
. Appeal *in formâ pauperis* by a, ...	*ib.*	282.
CASE. Transfer of cases.	36.	160.
should be specified. Grounds for striking off a, ..	153.	483.
Application for a postponement. Striking off a,	86.	356.
Transfer of cases on establishment of new Courts.	92.	374
instituted in a wrong Court. Transfer of a, ...	*ib*	375.
by a mere endorsement on the Libel, although such Libel discloses no sufficient cause of action. A. D. J. cannot dismiss a, ...	248.	591.
CARTOMS. Registry of, ...	40.	178.
inadmissible in evidence. Copies of, ..	*ib*	179.
Stamp.	56.	237.
CATTLE trespass.	54.	228.
for several generations. It is a known practice for a family to hold a drove of, ...	226.	562.
CART-ROAD on indemnifying the owners whose lands are taken for that purpose. Every village is entitled to have a, ...	194.	534

	Page.	Par.
CARRIER. Obligation of, ...	78.	323.
CESSION of ACTION from creditor to surety. ...	99.	402.
when necessary. ...	108,	427.
. Evidence of payment as against third parties. Case referred back for Plt. to obtain, ..	110.	427.
from the creditor, held entitled to the rights of the creditor on proving the due payment of the debt. A co-obligor having pending his action for contribution obtained a, ..	223.	557.
need not be made at the time of payment. The, ..	255.	599.
A party paying a prior mortgagee is entitled to stand in his place without, ..	300.	652.
CHILDREN'S share	8.	43.
Rights of, ...	69.	290.
joined as Administrators. Adopted; ..	73.	304.
of a predeceased spouse on the property of the survivor amounts merely to a mortgage, giving them priority in respect of their share over subsequent creditors or purchasers. The claim of the,	188.	530.
CHARACTER. Injury to, ...	58.	243.
CIVIL action after Criminal prosecution. ..	42.	186.
and Criminal suit for same act. ...	ib	188
CINNAMON grounds. Direliction of, ..	75.	314.
grounds. Prescription. Possession of, ...	76.	317.
CIRCULAR Letter not binding as a Rule unless &c. A, ...	323.	692.
CLAIM not tendered. Costs.	37.	166.
of Specific performance.	145.	475,
under Edictile Citation.	64.	273.
founded on sale and possession	73.	305.
for increased damages. Subsequent, ...	91.	371.
Several claims in the same suit. Prayer for general relief. Costs.	102.	411.
for a specific sum. Subsequent arrears. Prayer for general relief.	113.	433.
for damages for breach of covenant ..	218.	556.

	Page.	Par.
CLAIMANTS to property seized in execution. Rights of. ..	260,	608
CONFISCATION. Crown.	1.	3.
... .	8.	42.
. Fictitous transfer, ...	14.	72.
of Temple. Gifts by Priests. ..	16.	82.
...	69.	290.
. Delay on the part of Govt. Officers. ..	74.	312.
CONDITION executory	2.	7.
... ...	12.	59.
· Third parties	17.	85.
· Over-plus upon resale. ...	22.	109
Implied.	32.	146.
not binding on third parties.	115.	441.
CONTEMPT OF COURT. Second Claim	14.	70.
- A party suppressing his own claim to assist another.	154.	489.
· Indecorous observations on a D. C.	162.	505.
· Remonstrance against an order of the S. C.	171.	513.
.. ..	175.	*ib.*
A party who under proceedings of Court, but without notice to a claimant, sells an estate, after having opposed a previous sale by the claimant under proceedings of another Court, is guilty of contempt of the latter Court.	204.	547.
Where the real party entitled to the property in dispute, puts forward other claimants, in order to get himself called as a witness, he may be punished summarily as for, ..	215.	553.
CONSIDERATION of a Bond	25.	117.
Want of, ...	85.	353.
Mutual consent a sufficient, ..	140.	463.
in a Deed of Gift. Compensation of profits and expenses. Failure of, ...	141.	466.
Burthen of Proof, Want of, ...	317.	681.
CONCEALMENT of property	23.	112.

		Page.	Par.
Costs.	Double, ...	25.	117.
	Several Defendants	26.	122.
	Several Plaintiffs ...	62.	268.
	Recommendation to recover, ...	33.	150.
	for filing two answers. Proctor's, ...	42.	189.
	One of several Defendants condemned in, ...	46.	200.
	in sequestration.	ib	202.
	Double., as a punishment for false statements. A D. C. cannot impose it for an unfounded action.	53.	224.
	in an action for Libel where damages were not awarded.	55.	232.
	where plaintiff had established the greater part of his claim.	ib	233.
	Breach of Promise of Marriage. ...	57.	239.
	Interlocutory Appeal. ...	58.	243.
	when Plt. succeeds in the main object of his suit ...	60.	256.
	. Appeal *in formâ pauperis.* Provision as to future, .	74.	309.
	. Damages.	78.	324.
	Postponement on payment of, ..	81.	339.
	Higher class	91.	372.
	Admission without tender. ...	ib	373.
	Nominal damages ...	93.	378.
	Division of, ...	ib	383.
	Division of, ...	94.	384.
	Dishonest concealment. ..	107.	425.
	Increased, ...	155.	490.
	Modification of a decree. ..	158.	428.
	against a party who had been dropped in the course of the proceedings. ..	ib	500.
	of a party who has been dropped in the course of the proceedings. ...	171.	513
	Contradictory statement of plaintiff. ..	176.	514.
	decreed against several Defts. are a joint and several debt. ..	203.	545.
	A party who has been admitted to sue *in formâ pauperis* cannot be called upon to give security for costs. But if cast in costs execution may be issued against his person.	231.	564.

	Page	Par.
Costs. Double, for frivolous appeal	243.	583
; yet the Court will look to the whole merits of the case and the conduct of the parties in determining whether the costs should be in the original class, or in that of the amount of the judgment. Though the amount of damages ultimately decreed is an important criterion in awarding, ...	251.	593.
The poverty of the plaintiff furnishes no ground to compel him to find security for, ...	286.	637
disallowed for improper language in the Petition of Appeal	309.	670.
of a previous action must be paid before a new action is commenced.	320,	687.
Triple, *Qu?* Whether the D. C. can award, ...	324.	694.
of Defts. who have been vexatiously made parties. Plt. condemned in the, ...	328.	707.
Claiming more than is due is no ground for dismissal, but may affect the, ...	343.	734.
Conviction. Clause of the Regulation ...	34.	151.
Contract. Implied, ...	39.	174.
with Servant.	41.	180.
with Medical Practitioner. ...	68.	287,
. Marriage; . Stamp. Frauds and Perjuries ...	97.	398.
Breach of,. Principal and Agent. ...	148.	483.
Collective Decision. Review...	50.	215.
Conspiracy. A party suppressing his own claim to assist another's	154.	489.
Collation. Dowry.	57.	241.
Commission on deposit	65.	277.
Communication. Privileged, ...	79.	329.
Co-obligor paying on behalf of his co-obligors. ...	109.	427.
paying in his own name ...	*ib.*	*ib.*
taking cession succeeds to the creditors rights.	*ib.*	*ib.*
A, having pending his action for contribution, obtained a cession of action from the creditor, *held* entitled to the rights of the creditor, on proving the due dayment of the debt. ..	233.	557.
Co-Heirs (*Vide* Heirs.)		

	Page.	Par
CONVEYANCE by the Fiscal. Injunction issued by the S. C. to prevent the delivery of a, ...	201.	541.
COVENANT. A claim of damages for breach of, ..	218.	556.
An action for breach of, ...	227.	563.
CREDITORS. Priority of	17.	87.
Priority of, ...	77.	322.
Preference among,. Judgment. Execution ...	105.	422.
with consent of Executor. Administration to a,	181.	520.
or purchasers. The claim of the children of a predeceased spouse on the property of the survivor amounts merely to a mortgage giving them priority in respect of their share over subsequent, ...	188.	530.
by discharging the principal from gaol, without the consent of the surety, thereby discharges the surety. A, ...	193.	533.
CRIMINAL APPEALS. The S.C. will decide on all Interlocutory Orders, without the assent of parties, and also in, ...	200.	539.
CUSTOM.	2.	6.
of Merchants ...	150.	483.
Right of incoming tenant	101.	406.
of Ratnapoora in respect of *Nille* tenure ...	147.	477.
of the Country respect their feelings. In directing the attendance of parties and witnesses the Court will in view of the, ...	238.	575.
CURATOR *ad litem*. Authority to act as, ...	164.	507.
. Authority to act as, ...	183.	523.
DAMAGES. Action for,. Honorable amends. Costs. ...	53.	226.
by breach of Marriage Contract. Failing to shew, ...	58.	245.
during voyage. Proof, ..	78.	323.
Costs..	*ib*	324,
Subsequent claim for increased, ...	91.	371.
Costs. Nominal, ...	93.	378.
than is claimed, in the absence of a prayer for general relief. A Court cannot award, more,...	140.	463.
Interest on intended shipment ...	152.	483

		Page.	Par.
DAMAGES	for breach of covenant. Claim of,	218.	556.
	is peculiar to the Law of England. The difference between Penalty and Liquidated,	219.	ib.
	Where the Court refused to give,	228,	563
	Costs.	251.	593.
DECREE.	Force of,	4.	20.
	Third parties	9.	47
	Third party,	19.	98.
	Third parties.	31.	140,
	Recommendation to recover costs.	33.	150.
	when binding on third parties.	41,	182.
	Third parties.	62.	265.
	on contradictory evidence and on possession proved though not pleaded. Reversal of a,	80.	333.
	Third parties.	ib,	334.
	not binding on the third parties (not being Intervenients)	81.	336.
	not binding on a third party,	86.	357.
	Power of District Courts	100.	405.
	Alteration of a,	111,	428.
	Alteration of a clerical error in a,	115.	443.
	Former,. Authority of a party to sue on behalf of another,	135.	455.
	Costs on modfication of a,	158.	498.
	A. D. C. may alter its Interlocutory Orders, but not its Final,	193.	532.
	Final, in *Parlett v, Petachy Chetty.*	225.	559.
	after a lapse of two months, disallowed. Application to amend a written,	258.	604.
	Marginal observations by D. J. on the S. C.,	283.	629.
	already pronounced. The S. C. will correct a manifest error in a,	298.	648.
DEEDS.	Writer of a deed.	5.	26.
	Proof of a deed. Material evidence.	6.	28.
	Priority of,	26.	124.
	Possession of deed.	32.	144.
	Construction of deed.	ib	146.
	Possession of Title-deed	34.	154.
	A deed 30 years old need not be proved.	88.	362.

		Page.	Par.
Deeds	Proof of deed	93.	382.
	Date of deed. Delivery.	94.	387.
	A deed is void for want of proper stamp ...	95.	391.
	Reluctance to produce a deed, erasures and alterations thereon are suspicions against Plt's title and genuiness of the deed	96.	392.
	Action on a deed which had been proved to be be a a forgery and been cancelled. ...	113.	454.
	Cancellation of a Deed of Gift signed under a wrong impression. Failure of consideration. Compensation of profits and expences	141.	466.
	of 30 years standing do not require proof, yet the rule is open to exception whenever the deed is of a suspicious nature. Though as a general rule, ...	246.	586.
	Execution of a deed on a Sunday, and the failure to number and file the duplicate copy of a Bond do not render the instrument invalid. .	260.	609.
Demurrer	... ...	19.	99.
Desertion	of wife	22.	108.
Delivery	of Deeds	26.	124.
Demand.	Previous, ...	30.	139.
Defendants.	Several,. Costs.	26.	122.
	Reside in several Districts. Jurisdiction where,	45.	197.
	Trespass. Joint and several liability of, ...	92.	377.
	does not prejudice each other. Statements in separate answers of, ...	93.	381.
	right to insist upon legal proof ...	113.	434.
Debt.	Admission of a, ...	37.	166.
	by debtor. Assignment of a, ...	70.	294.
	Notes of Hand how far conclusive as proof of the, .	156.	495.
	Costs decreed against several Defts. is a joint and several, ...	203	545.
Defamation	.. ..	38.	172.
	Action for,. Variance in respect of the expressions used, ...	93.	379.
	Action for,. Defence &c. ...	117.	444.
	Action for,. Where two or more persons conspire unlawfully to injure another, all the acts of one in furtherance of the common		

	Page.	Par.
design, may be given in evidence against the other. Form of libel in such a case ...	259.	606.
Defence as Admr.	44.	192.
· General denial	47.	204
to an action brought by Executor ...	69.	288.
Evidence of a good *primâ facie*, ..	136.	460.
Default Deft. in, ...	44.	193.
Deft. in,. Is not entitled to go into evidence except to disprove the evidence adduced by the Plt.	52.	220.
of Defts. after issue joined.	65.	280.
Denial General, ...	62.	269.
Deposit. Commission on a, ...	65.	277.
Depository for loss. Liability of, ...	*ib.*	*ib.*
Depositions. Mode of recording, ...	115.	442.
Debtor Where a., of a firm granted a Bond to one of the partners and the other partner, after a subsequent dissolution of the Partnership sued the debtor for the amount, *Held* that the Plt. had no right of action.	241.	581.
Debtor and Surety. A surety paying the debt is entited to stand in the place of the creditor ..	255.	599.
Dismissal.	21.	104.
· Non-suit	29.	133.
· Non-suit .. .	42.	184.
Grounds for, ...	59.	252.
A D. C. cannot set aside its own, ...	90.	367.
after evidence heard. *Res Judicata.* ...	104.	420.
but may affect the costs. Claiming more than is due is no ground for, ...	343	734.
District Courts cannot rescind their own orders, ...	60.	257.
Jurisdiction of, ...	71.	296.
Matrimonial Jurisdiction of, ...	76.	318.
Powers of, ...	100.	405.
. Rights of,. Increased costs, ...	155.	490.
The,, have discretion to allow the examination of a party or his Proctor at any stage of the case, provided the questions are relevant	195.	536.

	Page.	Par.
DISTRICT COURTS A D.C. cannot give Judgment *ultra petita*	284.	630.
The D. C. cannot stop a case on an exception not taken by the parties ...	317.	678.
A D. C. cannot grant Parate Execution, or appoint a Commission unless authorized by law.	324.	693.
Qu? Whether the D. C. can award triple costs?	*ib.*	694.
DIVISION of the Island	71.	296.
of costs	93.	383.
of costs	94.	384.
already made among the heirs. Administration cannot be refused at any period after the death of an intestate. *Qu?* How far it may affect a, ...	235.	569.
DIVORCE. Suit for a,. Appeal to Privy Council ...	77.	319.
DISTRICT JUDGE cannot alter his own decree. A, ...	79.	327.
over Proctors. Power of, ...	81.	337.
is bound to record reasons for rejection of evidence. A, ...	143.	472.
cannot prosecute a suit in the former capacity before himself in the latter. A person who is both CustomMaster, and, ...	203.	546.
cannot dismiss a case by a more endorsement on the Libel, although such Libel discloses no sufficient cause of action. A, ...	248.	591
cannot without the consent of the parties appoint an Arbitrator or Umpire. The, ...	296.	645.
signature is necessary to every Order. The	339.	725.
DISHONEST concealment	107.	425.
DITCH on his own land so as to injure his neighbour's fenc. A party cannot cut a, ...	336.	722.
DONATION ... 8.. ...	32.	146.
DOWRY. Collation	57.	241.
DOUBLE Action for land and for mesne profits ...	107.	426.
DUTCH Law. Non-exercise of rights under the Roman- ...	61.	261.
Rule of Community. The wife's half share devolves on her children though illigitimate	299.	650.

		Page.	Par.
Edictile Citation.	Amendment of application ...	49.	211.
	Possession how established and citation how published ...	59.	249.
	claim under, ...	64.	273.
	Force of certificate of quiet possession...	ib.	274.
	A certificate of quiet possession, though not conclusive against a subsequent claimant who can satisfactorily account for his silence, is conclusive against one whose claim has been set aside. ...	236.	570.
Ejectment.	Title. ...	I.	4.
	Landlord and Tenant ...	100.	406.
	Forcible,. Proclamation of 5th August 1819 against forcible entry, considered. ...	263.	613.
Estoppel.	A party to a fraudulent deed estopped from disputing the rights accruing under it.	134.	454.
	except in certain cases; and may be explained by evidence. Admissions in an answer do not operate as an, ...	260.	607.
Estate	of predeceased parent left unsettled ...	182.	521.
Evidence.	False., New Trial ...	4.	17.
	Right to adduce. ...	5.	24.
	Fresh., New Trial ...	9.	45.
	Notes of, ...	10.	50.
	in a former suit ...	15.	75.
	Conflicting, ...	18.	92.
	of Insanity ...	22.	110.
	Dispensing with, ...	25.	118.
	Documentary, ...	26.	121.
	of Marriage ...	27.	125.
	of Ownership ...	29.	133.
	Copies of *Cartoms* inadmissible in, ...	40.	179.
	Proof of seizure in execution ...	44.	195.
	Unnecessary, when the existence of the document is denied. Notice to produce Documentary, ...	50.	216.
	of Breach of Promise of Marriage ...	52.	219.
	Deft. in default is not entitled to go into, ...	ib	220.

	Page	*Par.*
EVIDENCE	63.	269.
of payment. Order on a Shroff no,	64.	276.
A written acknowledgment of a balance due and letters are collateral,	70.	294.
and Opinion of Interpreter of the Court	72.	300.
to discredit a witness	*ib.*	301.
, and on possession proved though not pleaded, Reversal of a decree on contradictory,	80	333.
Proceedings in a case referred back for further,	83.	346.
False, . no ground of Appeal,	85.	352.
of Secretary	88.	364.
. Admissions made as a witness in a former action.	96.	394.
Appeal against a decree founded on,	103.	415.
of payment. Note on a Shroff not conclusive,	*ib*	416.
upheld by S. C. Judgment upon,	*ib.*	418.
Mode of reading depositions	115.	442.
in disproof of a *primâ facie* right	129.	446.
by Appellant no ground for a new trial. Non-production of,	135.	456.
of a good *primâ facie* defence	136.	460.
A D.J. is bound to record reasons for rejection of,	143.	472.
Further., under *Rule* 24 *Sect.* I.	*ib*	474.
Parole., of Partnership	155.	494.
necessary to support an action for goods sold and money lent	156.	496,
Hearsay., Ancient occupation. Descent or Ancestry.	182.	522.
A sale in execution how established in,	226.	56[illegible]
Parole., is admissible to prove satisfaction of a specialty	235.	567.
of a witness to contradict the statement of a party. The D. C. if it proceeds under *Rule* 11. *of Sect.* I cannot admit the,	*ib*	568.
The Record of a conviction in a Criminal prosecution for Assault is not admissible in a Civil action for the same Assault. The Surgeon's receipt is not by itself evidence of his attendance.	257.	603.
Secondary,. of a Deed when admissible	258.	605

	Page.	Par
EVIDENCE against the other. Where two or more persons conspire unlawfully to injure another, all the acts of one in furtherance of the common design may be given in,	259.	606.
Admissions in an answer do not operate as an estoppel except in certain cases; and may be explained by,	260.	607.
Action for the restitution of money actually paid	263.	612.
The privileges of the Kandyans do not extend to the Law of,	279.	621.
Intervenient's right to call,	280.	624.
Best,	295.	624.
An offer of compromise unless accompanied with a caution that it is confidential, is admissible in,	301.	656.
Procedure on a remand for further,	305.	660.
Rules as to production of Deeds before and at the Trial	308.	668.
of Right of Way,	310.	671.
Want of consideration. Burthen of Proof.	317.	681.
EXECUTION. Sale in,	12.	60.
against person.	25.	120.
how established in evidence. A sale in,	226.	561.
may be issued against his person. A party who has been admitted to sue *in formâ pauperis* cannot be called upon to give security for costs; but if cast in costs.	231.	564.
The Articles of War allow of an action, but do not permit,	238.	573.
Rights of claimants to property seized in,	260.	608.
after taking the Deft's bond for a part of the judgment in satisfaction of the whole. A Plaintiff cannot sue out,	287.	640.
pending Appeal. The S. C. will under certain circumstances stay,	ib	ib
Parate., or appoint a Commission unless authorized by Law. A D.C. cannot grant,	324.	693
EXECUTOR for money belonging to third parties. Action by,	69.	288.
for a false plea, Costs against an,	71.	295

	Page.	Par.
EXECUTOR of an Administrator. Costs against the, ..	88.	363.
Administration to creditor with consent of, ...	181.	520.
by a Legatee. Action against an, ..	195.	537.
EXPARTE hearing on absence of Deft. Necessary postponement	100.	403.
Trial. Proceedings on,. *Qu?* If the Plt. be a married women?	324.	695.
EXAMINATION of parties	129.	445.
of a party or his Proctor at any stage of the case provided the questions are relevant. The D. C. has discretion to allow the, ...	195.	536.
of parties. Course to be adopted in deciding cases upon the pleadings and, ..	247,	587.
of parties, Effect of, ...	279.	622,
of witnesses not on the List. ...	342.	732
FAILURE of consideration	141.	466.
FALSE ARREST *Qu?* Whether an arrest before the expiration of the period allowed for Appeal would be a, ...	239.	576.
FICTITIOUS. transfer	14.	72,
FINE. A party to a suit may be fined ...	37.	163.
for vexatious appeal	132.	449.
for vexatious appeal	136.	459.
FISCAL'S Sale. Non-payment of purchase money ...	59.	248.
Sale. Opposition by the creditor ...	72.	302.
Sale. Title under, ...	78.	325.
Sale and Certificate form no bar to other claims	103.	413.
Return	112.	430.
Sale. Claim and opposition. Concellation of Fiscal's Certificate. Order for consolidation of two suits	129.	447.
Injunction issued by the S. C. to prevent the delivery of a conveyance by the Fiscal. ...	201.	541.
FORMA PAUPERIS. Suit in, ...	23.	112.
Application to defend in, ..	39.	175.
· Former decree. Application to sue in,	42.	185.
Opposition to application in, ..	47.	205.
Appeal in, .. .	66.	282.

	Page.	Par.
FORMA PAUPERIS. Provisions as to future costs. Appeal in,	74.	309.
Fresh reference. Petition in, ...	92.	376.
Petition to defend in, ...	136.	460.
allowed in spite of a Proctor's certificate. Defence in, ...	147.	479.
. Mode of Procedure. Application to sue in, ...	170.	512.
cannot be called upon to give security for costs. But if cast in costs execution may be issued against his person. A party who has been admitted to sue in,	231.	564.
should be made on the first appearence. Any objection to sue in, ...	253.	596.
FOREIGN Will	35.	156.
FOREIGNER. Security for Costs	49.	213.
FORM of reference to Arbitration	67.	286.
of suing on behalf of a wife	332.	718.
FORGED deed. Action on a, ...	133.	454.
FORMER decree, ...	135.	455.
FORFEITURE of Nindegame decreed on default of paying Ottoo	327.	706.
FRAUDS and PERJURIES.	3.	12.
.. ..	6.	31.
... ...	14.	69.
Contract in writing	20.	101.
Reg. of Frauds	25	119.
Reg. of Frauds not retrospective	36.	161.
Reg. of, ...	54.	229.
Land.	55.	231.
Reg. of,. Recovery of money paid. ...	82.	342.
Reg. of,. Sale of immoveable property. Contract in writing. Stamp.	88.	366.
Statute of Frauds. Objection not taken in Court below.	95.	390.
Stamp. Marriage Contract	97.	398.
Reg. No, 1. of 1806 does not act retrospectively.	300.	653.
Statute of Frauds. A contract for the sale of *growing* timber must be in writing ..	304.	659.
FRAUDULENT Deed	134.	454.
FREIGHT. Booking for,. Liability of Master thereon...	150.	483.

	Page.	Par.
FRIVOLOUS litigation. Punishment for, ...	174.	513.
FUNERAL EXPENCES	39.	176.
incurred for illegitimate husband ...	79.	331.
FURTHER relief. Prayer for, ...	91.	373.
evidence under *Rule* 21. *Sect.* I. ...	143.	474.
GANSABE. Award of, ...	6.	29.
Award of, ...	10.	52.
Jurisdiction of, ...	29.	135.
GENERAL DENIAL. Answer.	62.	269.
... ...	144.	437.
Burthen of proof. Possession. Title. Value. Damages.	*ib.*	438.
the Deft. prayed for leave to answer, but stated no special circumstances in support of his prayer, the Court refused leave. When after a, ...	231.	565.
GIFT and possession. Proof of, ...	5.	25.
by a priest.	16.	82.
signed under a wrong impression. Failure of consideration. Compensation of profits and expenses. Cancellation of a Deed of, ..	141.	466.
of more then donor was entitled to... ..	153.	485.
Verbal,. of lands. Heirs when estopped from disputing a,	*ib*	486.
GOVERNMENT grant, ...	12.	59.
Prejudice to, ...	16.	83.
. General hypothecation of, ...	56.	234.
Objection by a third party. Right of the,	74.	310.
Proclamation.	76.	316.
land. Application for and possession of, ...	155.	492.
Renter. Where a,. deprived himself of a right to remission of rent, ...	205.	548.
GOODS SOLD and money lent. What evidence necessary to support an action for, ...	156.	496.
GUARANTEE, ...	14.	69.
... ...	66.	281.
GUARDIAN. Guardianship of children on the decease of a wife.	114.	439.
over Plts *non compos mentis*	232	566.

	Page.	Par
HANDWRITING, Comparison of,. Proof of a Bond. Attesting witnesses.	177.	515.
Comparison of,. Authenticity of documents presumed.	178.	516.
HEIRS. Disinherison by deed of heir-at-law ...	5.	23.
Judgment binding on, ...	65.	278.
Presumption in favor of heir. Possession. Acknowledgment of title.	87.	360.
Right of heir pending administration. ..	104	419.
when estopped from disputing a verbal bequest of lands.	153	486.
of wife how far responsible to creditors of husband.	159,	501.
Male. Service Parveny. No prescription against,	169.	509.
Administration cannot be refused at any period after the death of an intestate. *Qu?* How far it may affect a division already made among the, ...	235.	569.
An heir who takes possession of the property renders himself liable for the debts of the intestate...	267.	615.
The possesstion of one joint heir is not adverse to the other, ...	271.	618.
One of several co-heirs may sue the Administrator for his share...	338.	724.
Allegation of intestacy where the Plt. sues as heir.	341.	730.
One of several co-heirs may sue the Administrator for his share.	343	734.
HEARSAY EVIDENCE Ancient occupation &c. ..	183.	522.
HUSBAND AND WIFE. Separation. Wife's debts. ..	10.	54.
Desertion of wife	22.	108.
Liability of a wife at Batticaloa ..	62.	267.
the wife's person cannot be taken up. On a Judgment against, ...	271.	617.
Form of suing on behalf of a wife..	332	718.
(*Vide* "KANDYAN LAW." "MAHOMEDAN LAW." "THESEWALLEME.")		
HYPOTHECATION of Govt. General, ...	56.	234.
ILLEGITIMACY. Marriage	76.	315.
INHERITANCE. Joint,. *Qu?* Whether Ord. No. 8 of 1834 applies to a, ...	226.	560.
INJURY to character –	58.	244.

	Page	Par.
INJUNCTION against a sale granted by the Supreme Court..	142.	471.
issued by S. C. to prevent waste. ..	200	540.
issued by S. C. to prevent the delivery of a conveyance by the Fiscal.. ..	201.	541.
issued by S. C. to restrain the removal of crops,	203.	544.
granted on a mere Petition where there was no time to obtain the necessary affidavit. ...	236.	571.
A Court may issue injunctions to public functionaries, but cannot give them instructions to do any act.	249.	592.
refused for want of proof of title. ...	286.	636,
to restrain sale of goods.	325.	700.
to restrain waste.	330,	711.
INSANITY. Evidence of, ...	22.	110.
. Liability of father, ...	48,	208.
INSOLVENT may sue. When, ...	33.	148.
INSTRUMENTS. Unnegotiable, ...	41.	183.
Proof of n instrument.	73.	306.
Proof of lost instrument.	84.	349.
INTEREST not stipulated for...	55	230.
Payment of produce where produced is to be retained in lieu of, ...	87.	361.
not claimed in the pleadings.	147.	478.
on intended shipment. Damages. ...	152.	483.
though not claimed in the Libel. Where the Plt. proceeds on a penal Bond the Court may decree,	238.	574.
INTEREST in land, Proof of an, ...	179.	517.
INTERLOCUTORY Appeal. Costs.	58.	243.
Order. Appeal against, ...	85.	355.
Order may be rescinded by D. J. ...	*ib*	*ib*
Appeal. Trial pending, ...	96.	396.
Orders, but not its final decrees. A D.C. may alter its, ...	193.	532.
Orders without the assent of parties and also in Criminal Appeals. The S. C. will decide on all, ...	200.	539.

	Page.	Par.
INTERVENTION. Object in allowing, ...	59.	253.
... ...	90.	369.
There is no limit as to the possible number of Intervenients.	173.	513.
An Intervenient having filed his Petition of Intervention pleading to the merits, cannot afterwards plead to the jurisdiction ..	224.	558.
Intervenients right to call evidence. ...	280.	624.
A party cannot be compelled to intervene; but where a vendor refuses to intervene the Plt. may amend his Libel by making him a party Deft.	299.	651.
The "*Government of Ceylon*" is not a sufficient discription of an Intervenient.	304.	658.
The Court will not delay proceedings on an irregular Intervention; but their claims will be reserved.	308.	667.
At what stage a party may intervene. ...	331.	714.
INTERPRETER OF THE COURT. Evidence and Opinion of, ..	72.	300.
INTESTACY where the Plt. sues as heir. Allegation of, ...	341.	730.
JAFFNA. By the Law of, a son is not liable for his father's debts, unless the latter has left property, and the son has taken possession thereof.	264.	614.
Customs.	301.	655
JOINT. OWNERS.	23.	112.
... .	60.	255.
of land. Mode of ascertaining shares. ...	165.	508.
JOINT AND SEVERAL DEBT. Costs decreed against several Defts are a, ..	203.	545.
JOINT-HEIR is not adverse to the other. The possession of a,	271.	618.
JOINDER of parties ordered on Appeal. ..	326.	702.
JUDGMENT.	7.	38.
Prescription of judgments.	42.	187.
binding on heirs.	65.	278.
for less then the amount of damages claimed. Costs,	91.	372.
Priority of Mortgage over, ...	103.	414.
formed upon incredibility of evidence. ..	*ib.*	418.
as between a Plt. and Deft. cannot prejudice a third party.	141.	467.

	Page.	Par.
JUDGMENT in appeal on an imperfect record held not final. A, ...	... 143.	472.
not to exceed the amount claimed in the Libel...	166.	508.
may be revived on a Rule Nisi. A superannuated,	193.	531.
where the party aggrieved thereby has not appealed. The S. C., will not alter a,	.. 202.	543.
of ROUGH C. J. *in No.* 84 *D. C. Manaar.*	.. 211.	550.
has been entered against a Deft without notice his remedy is not by appeal. Where a,..	... 243.	583.
of a D. C. is appeal to the S. C. and not by a fresh action. The remedy against any omission or defect in the,.. ...	.. 248.	589.
ultra petita. A D. C. cannot give, ..	.. 284.	630.
The course adopted where the D. C. omitted to record the reasons of its,..	... 285.	634.
in appeal. Force of a, ..	... 304.	660.
Prescription of, ...	... 319.	685.
JURISDICTION. Cause of action. ...	.. 13.	67.
Residence of Deft. ..	... 29.	136.
where Defts reside in several Districts.	... 45.	197.
of District Courts. ..	... 71.	296.
of District Courts. Matrimonial,..	.. 76.	318.
Waiver of a plea to the, ..	... 112.	432.
if founded on the residence of the Deft. or the place of the cause of action, must be pleaded before discussing the merits. A plea to the,	223	558
An Intervenient having filed his petition of intervention pleading to the merits, cannot afterwards plead to the,	.. 224	*ib*
Where a Deft. has appeared and answered he cannot afterwards object to the,	.. 248.	590.
JUDGE previously engaged as Advocate in the cause. A,	95.	388.
who is also the Government Agent. A suit by the Government of Ceylon cannot be entertained by a,	136	461

	Page.	Par
KANDYAN LAW.		
Transfer. Consent of son.	1.	1.
Transfer to procure support.	1.	2.
Succession.	2.	8.
Rights of a Widow.	2.	9.
Marriage in *Deega*. Inheritance. ...	3.	13.
Gift to widow.	4.	21.
Disinherison.	6.	32.
Donation.	7.	37.
Marriage in *Deega*.	13.	63.
Marriage in *Deega*.	15.	73.
Marriage in *Beena*.	16.	79.
Right of a divorced wife or destitute widow for support from her parents. ...	96.	393.
Succession of Nephews &c. ...	101.	408.
Majority.	106.	418.
Adoption.	153.	484.
Heirs when estopped from disputing a verbal bequest of lands	*ib*	486.
A grandmother's interest in the estate of the grandson.	201.	542.
Qu? As to the custom of Saffragam respecting a *Beena* husband's right to succeed to wife's property.	258.	605.
The father is not of kin to his *Beena* children. *Qu?*	295.	643.
An only daughter by a previous marriage is entitled to half the father's lands. ..	328.	710.
Prescription does not run against the heir pending the widow's life-interest. ...	329.	*ib*
An only daughter does not forfeit her rights by a *Deega* marriage.	329.	710.
An heir cannot be disinherited without cause of disinherison stated in the Deed	345.	737.
Widow's Life-interest	*ib*	*ib*

		Page.	Par.
KANDYAN TERRITORIES	Priority of general mortgage in, ..	105.	422.
	as elsewhere a married woman cannot sue or be sued alone ; and a Judgment against her is void. In the, ...	272.	619.
	Administration in the Kandyan District to the guardian of a minor child.	105.	423.
KANDYANS do not extend to the Law of Evidence. The privileges of the, ...		279.	621.
LANDLORD AND TENANT.		9.	46.
	Ejectment.	100.	406.
	Right of incoming Tenant. Custom.	101.	*ib.*
	Rights and duties of Landlords. ..	131.	448.
	A receipt not under seal is not conclusive against the party giving it, but only a *primâ facie* evidence, which may be contradicted by parol.	254.	598.
	If a Landlord give a receipt for the rent last due, it is to be presumed that the former rent has been paid.	*ib.*	*ib.*
	OneTenant in common cannot prescribe against this Co-Tenant under thirty years.	272.	620.
LAND.	Registry of, ...	9.	48.
	Frauds and Perjuries.	55.	231.
	Waiver of agreement for transfer of, ...	143.	475.
	Verbal Bequest...	153.	486.
	Government. Application for and possession of, ...	155.	492.
	Proof of an interest in, ...	179.	517.
	is entitled to compensation. A party who *bona fide* builds on another's, ...	282.	628.
	Mallepalle defined.	283.	629.
LAW.	District order no,. Cattle trespass. ...	54.	228.
LETTERS are collateral evidence &c.		70.	293.
LEGAL PROOF.	Deft's right to insist upon, ..	113.	434.

	Page.	Par.
LEGITIMATION by subsequent marriage, ...	162.	504.
LEGACY. Action by a Legatee against an Executor. ...	195.	537.
A father is not entitled to receive a Legacy left to his minor child without the authority of the S. C. which has in this respect succeeded to the powers of the *Weeskamer.*	279.	623.
was intended as a satisfaction for an inheritance, *held* that the legatee cannot claim both. Where a, ...	325.	693.
LIBEL. Action for,. Costs.	55.	232.
Action for,. Defamatory words. ..	132.	452.
LIQUIDATED DAMAGES, is peculiar to the Law of England. The distinction between PENALTY and,	219.	556.
LOAN converted into purchase.	47,	204.
LOSS. Liability of Depository for, ...	65.	277
LOSS INSTRUMENT. Proof of, ...	84.	349.
LOTTERY Ticket. No action is maintainable on a, ...	271.	616.
MARRIAGE not set aside in the lifetime of the parties. ...	16.	80.
Agreement to marry.	20.	102.
Evidence of, ...	27.	125.
Evidence of Breach of Promise of, ...	52.	219.
Second,. Administration of first wife's property.	*ib*	223.
Breach of Promise of. Costs, ...	57.	239.
Contract. Breach of,. Failure to shew damages by such breach.	58.	245.
Contract. Claim for penalty and expences imposed and incurred for and by Breach of, ...	*ib*	246.
Illegitimacy.	76.	315.
Amicable Settlement. Damages. Breach of Promise of, ...	84.	351.
Proceedings upon opposition to Banns of, ...	85.	354.
Contract. Stamp, Frauds and Perjuries. ...	97.	398.
Legitimation by subsequent marriage. Proof of, ...	162.	504.
. Answer to the action, Action for the cancellation of Banns of, ...	206.	549.
Registration. Regulation. ...	209.	*ib*

		Page.	Par.
MARRIAGE.	Consent of parties to be recorded in registration.	ib	ib
	Contract. Remedy of Husband in case of Seduction. Parent becoming a party to the child's,	210.	ib
	cannot be given by Proxy. Consent to, ...	317.	679.
MAHOMEDAN LAW.	... ...		
	Sale by husband of Dowry property. ...	34.	153.
	Dowry property. Separation. ...	43.	191.
	Magger, *Kaycooly* &c. when recoverable.	56.	236.
	Marriage contract. Damages not accruing in consequence of the breach. ...	58.	245.
	Claim for penalty and expences. ...	ib	246.
	Assent to marriage contract. Implied. ...	ib	247.
	Right of wife to sue alone. ...	90.	370.
	Oral Bequest of real and personal property, ...	175.	514.
	Rule of Division among collaterals.	176.	ib
	Heirs of a deceased daughter. ...	ib	ib
	A Mahomedan having once made a promise of marriage is bound to fulfil it before he contracts another. ...	281,	626.
	A Husband and Wife may sue each other, ...	300.	654.
	A Wife deserting may be sued for any property taken away by her; and forfeits her dowry, or, if already paid, double; and the Husband may sue without first applying to the Priest or Arbitrators ...	ib	ib
	Divorce among Mahomedans. Alimony.	322.	689.
MAHOMEDANS.	Registry of *Cartoms*, ...	40.	178.
	Copies of *Cartoms* inadmissible in evidence.	ib	179.
	Moorish Mosque. Exclusive right of celebrating festivals. Voluntary offerings ...	51,	218.
	Grant of Administration to a young man of 21.	327.	705.
	Right of Moorish Priests under acts from Government, discussed. ...	344.	735.

		Page.	Par
MASTER AND SERVANT.	Contract with the Servant.	41.	180.
	A Master not liable for trespass by Servant.	320.	686.
MALICIOUS PROSECUTION.		61.	262.
	Requisites of an Action for,	ib	263.
	Reparation.	ib	264.
MALICE when implied		114.	436.
MATRIMONIAL jurisdiction of District Courts.		76.	318.
MANDAMUS to compel a D. J., to accept security. Application for a,		163.	506
MARRIED WOMAN on a Bond granted by her during coverture. Divorce. Action against a,		102.	412.
	cannot appeal. A,...	186.	527.
	cannot sue or be sued alone; and a judgment against her is void. In the Kandyan Territories as elsewhere a,	272.	619.
	A Woman under coverture cannot sue without joining the Husband	308.	669.

(*Vide* "KANDYAN LAW" "MAHOMEDAN LAW" "THESEWALLEME".)

		Page.	Par
MEDICAL PRACTITIONER.	Renumeration of,	39.	174.
	Remuneration for Medical services ...	68.	287.
	Contract with,	ib	ib
MERCHANTS.	Merchant's Day-Book. Provisional judgment.	60.	259.
	Merchant's Account containing "mention of the time of payment."	61.	260.
	Custom of,	150.	483.
MESNE PROFITS when decreed.		107.	426.
	Double action for Land and for,	ib	ib
MINORITY.	Necessaries	32.	145.
	A Father is not entitled to receive a legacy left to his minor child without the authority of the S. C. which has in this respect succeeded to the powers of the *WeesKamer*	279.	623.
MINISTERS OF RELIGION.	Calumnious charges by,	142.	469.
MORTGAGE over subsequent sale. Priority of,		21.	107.
	of Government. General,	56.	234

	Page.	Par
Mortgage Right of Mortgagee when mortgaged property is sold.	72.	302
over judgment. Priority of, ...	103	414.
Proof to establish, ...	132.	451
giving them priority in respect of their share over subsequent creditors or purchasers. The claim of the children of a predeceased spouse on the property of the surviver amounts merely to a, ...	188	530
is not thereby discharged. A Surety who, after notice, does not object to the sale of the, ...	193.	533
granted in 1823 before a School-Master and witnesses is valid. A, ...	204.	547
accompanied with possession of the title deeds, is entitled to preference over a subsequent mortgage by mere contract. A, ...	ib	ib
Possession of mortgagee becomes adverse after the lapse of the period fixed for redemption. Ten years possession will give him a title by prescription.	281.	625.
Money paid	19.	97.
paid without receipts	41.	181.
due but unpaid. Action to recover, ...	43.	190
actually paid. Evidence. Action for the restitution of, ...	263.	612.
Mutuality in an agreement may be presumed though the Deft. has not signed it.	139.	463.
Mutual Consent a sufficient consideration. ...	140.	ib.
Namptissement	60.	258.
may be demanded on a Merchant Day Book	ib	259.
... ...	77.	321.
considered. The Law of, ...	332.	720.
Practice of, ...	334.	721.
New Trial	9.	45.
Non-production of evidence by Appellant no ground for a, ...	135.	456.
allowed in order to allow a party to produce evidence against prescription. A, ...	137.	462.

	Page	Par
New Trial Where the Plt. has manifestly proceeded in ignorance, the S. C. will allow a, ...	256.	602.
Necessaries. Minority....	32.	145.
Nindegamme decreed on default of paying Ottoo. Forfeiture of, ...	327.	706.
Novation....	12.	61.
Non-Suit	19,	96.
. Dismissal	42.	184.
a Plt., merely because he had not *summoned* certain witnesses. The Court cannot, ...	287.	639.
Non-Joinder of Plts....	44.	193.
Non-Payment of price. Right of Re-sumption on, ...	66.	281.
Non-Acceptance of offers no agreement	80,	332.
Non Compos Mentis. Guardians over Plts.	232.	566,
Notes of Hand how far conclusive as proof of the debt....	156.	495.
Nominal Damages. Costs....	93.	378.
Notice to produce documentary evidence unnecessary when the existence of such document is denied.	50.	216.
, his remedy is not by appeal. Where a judgment has been entered against a Deft without, ...	243.	583.
in English on a Cingalese party is not "*due notice*" Service of a, ...	341.	731.
Objection during Trial. Appeal.	44.	196.
not taken in Court below. Statute of Frauds.	95.	390.
to witness.	100.	404.
that the Plt. was not at the time the owner of the article contracted to be delivered.	140.	463.
Plt. not entitled to object to a particular construction of the Answer.	148.	481.
which was not made a ground of appeal. The S. C. refused to entertain an, ...	325.	699.
Office of *Caporale*. Qualification for, ...	32.	147.
Officer of the Court. Attachment against an, ...	140.	464.
Onus Probandi. General denial.	114.	438.
Opinion and Evidence of Interpreter of the Court.	72.	300.
Order. A Court may rescind a preparatory, ...	148.	480.
Ootto. Forfeiture of Nindegamme decreed on failure to pay, ...	327,	706.

		Page.	Par.
OWNERSHIP.	Evidence of, ...	29.	133.
	Primâ facie proof of, ...	155.	491.
PARTNERSHIP.	Evidence of, ...	6.	33
	.Payment to one of the partners. Dissolution of, ...	154.	488.
	Parole evidence of, ...	155.	494.
	The Proxy of one of several partners is sufficient to authorize an action. ...	240.	578.
	Where a debtor of a firm granted a Bond to one of the partners and the other partner after the dissolution of the partnership sued the debtor for the amount, *held* that the Plt had no right of action. ...	241.	581.
PARTIES.	Fining a party to a suit. ...	7.	35.
	to Arbitration. Assent of, ...	19.	95.
	Absence of a party to a suit through illness. ...	24.	113.
	to Arbitration. Consent of, ..	31,	141.
	A party to a suit may be fined. ...	37.	163.
	A party subsequently joined as Deft. ...	*ib*	165.
	A party misled by Clerk of Court. ..	79,	328.
	Revivor of a suit abated by the death of a party.	113.	435.
	Examination of, ...	129.	445.
	Costs against a party who has been dropped in the course of the proceedings. ...	158.	500.
	The absence of a party is not in all cases a good ground for postponement. ...	192.	531.
	The D. C. has discretion to allow the examination of a party or his Proctor at any stage of the case provided the questions are relevant. ...	195.	536.
	Where the real party entitled to the property in dispute puts forward other claimants in order to get himself called as a witness, he may be punished summarily as for contempt of Court.	215,	553.
	The D. C. if it proceeds under *Rule* 11 *of Sect.* 1 cannot admit the evidence of a witness to contradict the statement of the party. ..	235.	568.

		Page.	Par.
PARTIES.	In directing the attendance of parties and witnesses, the Court will, in view of the customs of the Country, respect their feelings. ..	238.	575.
	Effect of examinations of, ..	279.	622
	In trespass where a Deft sets up the title of a third party the Court is not bound to make him a party unless he chooses to intervene ...	281.	632
	Where a party appears by Attorney, the D. C. may require the presence of the party.. ...	324.	696.
	Joinder of parties ordered on appeal.. ...	326.	702.
PAWN.	Forfeiture of, ...	16.	81.
	Creditor when bound to return a, ...	28.	132.
	Action to recover, ...	101.	410.
PADDY.	Calculation of compensation... ...	17.	85.
PAYMENT	by delivery of Promissory Note... ...	21.	106.
	Voluntary, ...	28.	130.
	of Bond. Proof of, ...	37.	164.
	pleaded but not proved. Prescription... ..	63.	270.
	from lapse of time. Presumption of, ...	ib.	271.
	Order on a Shroff no evidence of, ...	64.	276.
	Part,. Admission of, ...	79.	330.
	Bond. Proof of, ...	ib	ib
	Appropriation of, ...	83.	348.
	of produce in lieu of interest... ...	87.	361.
	Pleading. Proof of, ...	101.	409.
	Note on a Shroff not conclusive proof of, ...	103.	416.
	as against third parties. Evidence of, ..	111.	427.
	to one partner... ...	154.	488.
PAUPER.	Certificate of Proctor... ...	28.	129.
	Proctor's Certificate... ...	59.	250.
	Proof within a reasonable time... ...	64.	275.
	Objection to Proctor's report... ...	98.	400.
	Vexatious action by, ...	106.	424.
	Petition (*Vide* " PROCTOR.")		
	(*Vide* " FORMA PAUPERIS.")		
PAROLE	engagement of Seamen... ..	30.	137.
	Evidence of partnership. ..	155.	494.
	Evidence is admissable to prove satisfaction of a specialty.	235.	567.

	Page.	Par.
Parveny. Service,. Alienation...	52.	222.
Forfeiture of., by Alienation...	82.	341.
Alienation of,	247.	587.
Alienation of,	255.	600.
Parent. Rights of children. Destitution of,	70.	292.
becoming a party to the child's marriage contract	210.	549.
Partition. Every holder of property in common is entitled to call for a partition. Form of order for,	237.	572.
Form and mode of effecting,	302.	657.
decreed in the course of administration.	319.	684.
Parate Execution or appoint a Commission unless authorized by Law. A D. C. cannot grant,	324.	693.
Penal Law. Confiscation...	8.	42.
Bond, the Court may decree interest, though not claimed in the Libel. Where the Plt proceeds on a,	238.	574.
Penalty. Proof...	11.	57.
and Liquidated damages is peculiar to the Law of England. The distinction between,	219.	556.
All stipulated penalties are reducible; especially where there is no reciprocity in the penalties...	228.	563.
Pearl Fishery. Agreement..	24.	114.
Perjury. Admission of a witness that he has been convicted of,	88.	365.
Performance (*Vide* "Specific Performance")		
Pleading. Replication when necessary...	15.	78.
Libel. Claim of Plt...	18.	93.
Libel. Variance..	38.	171.
Injury done by each Deft need not be stated in the Libel...	60.	254.
Amendment of Libel...	72.	303.
Several counts. Prescription how pleaded ..	99.	401.
Proof of payment..	101.	409.
Interest not claimed in the,	147.	478.
Where the Plt proceeds on a penal bond the Court may decree interest, though not claimed in the Libel...	238.	574.

	Page.	Par.
PLEADING and examination of parties. Course to be adopted in deciding cases upon the,	.. 247.	587.
Effect of examinations of parties...	... 279.	622.
The Court will reject an ill-written Libel	... 284.	631.
Procedure in case of imperfect,	.. 318.	683.
should be signed either by the party himself or a Proctor holding a proxy..	.. 327.	704.
Where a Deft is sued as heir or representative, the Libel must shew that he is sole heir, or how he is a representative...	... 331.	715.
Where the Libel was unintelligible, the S. C. absolved the Deft.	... *ib*	716.
PLANTING share. Joint-Ownership...	... 60.	255.
share. Compromise...	... 180.	518.
PLAINTIFFS several., Costs.	... 62.	268.
interest in the suit.	.. 181.	519.
non compos mentis. Guardian over,	... 232.	566.
PLEA of not indebted.	... 83.	347.
to the jurisdiction if founded on the residence of the Deft or the place of the cause ef action, must be pleaded before discussing the merits. A,	... 223.	558.
POSSESSION under mortgage.	... 2.	5.
Primâ facie case.	... 10.	49.
by permission.	... 85.	158.
What amounts to Adverse,	.. 71.	298.
acknowledgment of title.	... 179.	326.
proved, though not pleaded. Reversal of a decree on contradictory evidence and on,	... 80.	333.
Actual occupation. Construction of the word,	87.	359.
Acknowledgment of title... ...	... *ib*	360.
. Burthen of proof... ...	... 114.	438.
Presumption in favor of possessor... ..	... 132.	450.
of the property agreed to be transferred...	... 145.	475.
primâ facie proof of ownership ..	.. 155.	491.
Prescriptive., of Service Parveny lands...	... 166.	509.
presumed to be adverse until the contrary be shewn prescription... ...	... 170.	511.

	Page.	Par.
Possession. Presumption arising from, ...	170.	517.
Prescriptive,. of Service Parveny lands. ...	247.	587.
of mortgagee becomes adverse, When the, .. .	281.	625.
Postponement, unless unavoidably absent. Absence of proctor no ground for, ...	54.	227.
How often a case may be postponed owing to absence of material witnesses ..	69.	291.
on payment of costs.	81.	339.
. Striking off a case. Application for, ..	86.	356.
Plt being unprepared for trial in consequence of Deft's misrepresentation. ..	184.	524.
Discretion of the Court below open to revision in Appeal. Grounds for a, ...	186.	528.
Absence of Counsel or Agent may be a ground for, ...	*ib*	*ib*
The absence of a party is not in all cases a good ground for, ...	192.	531.
in consequence of a Proctor's absence, the S, C directed the Proctor to pay the batta of the witnesses. On a, ...	295.	644.
Practice. Rules of, ...	74.	308.
and pleadings in Colonial Courts, Rules of, ...	132,	458.
in Rules of,. necessity. ...	155.	593.
in cases where a Plt is unavoidably absent on Trial day..	340.	727.
Prayer for further relief.	91.	373.
Claim of a specific sum. Subsequent arrears. ...	113.	433.
Privileged Communication...	79.	329.
Prescription, Possession under mortgage... ...	2,	5.
Crown...	3.	14.
Bond...	4.	18.
should be specially pleaded...	*ib*	19.
Possession under mortgage...	5.	22.
Interruption of, ...	6.	30.
no bar to a claim unless specially pleaded..	7.	39.
Government and Temple duty. ..	9.	46.

		Page.	*Par*
PRESCRIPTION.	Possession under mortgage.. ..	10.	51.
	Presumption of payment how rebutted. ...	13.	66.
	Evidence to rebut, ...	15.	77,
	Meaning of "*adverse title*," ..	20.	103.
	not effected by irregularity in the instrument &c. Title by, ...	28.	131.
	Agreement misnamed.	29.	134.
	Performance of service...	30.	138.
	by a previous action. Interruption of, ...	34.	152.
	Previous title...	38.	170.
	of Judgments..	42.	187.
	against Letters of Administration. ...	47.	206.
	not pleaded. Payment pleaded but not proved.	63.	270.
	What amounts to "*adverse title*." ..	71.	298.
	Possession by Crown of Cinnamon grounds	76.	317.
	Servant wages.	77.	320.
	of Plt's claim as Executor.	81.	338.
	ought to be pleaded.	*ib*	340.
	Right of a grandson during father's life time to a prescriptive title acquired by grandfather.	82.	343.
	how pleaded. Pleading several counts. ...	99.	401.
	. Bond. Offer of a compromise. ...	129.	446.
	how pleadable after an admission of the debt.	143.	473,
	A new trial granted in order to allow a party to produce evidence against, ..	137.	462.
	Claim of specific performance when prescribed.	145.	475.
	Prescriptive possession of Service Parveny lands.	166.	509.
	against male heirs. Service Parveny ...	169.	*ib*
	Two special points regarding, ...	170.	511.

		Page.	Par
PRESCRIPTION	if proved to have been originally a mere cultivator is bound to shew when his title became adverse. A party claiming title by,	187	529.
	Prescriptive possession of Service Parveny lands.	247.	587.
	A parol admission is sufficient under the proviso in the 7th Clause of the Prescription Ordinance.	253	597.
	Prescriptive possession of Service Parveny lands.	255.	600.
	One tenant in common cannot prescribe against his co-tenant under thirty years......	272.	620.
	Possession of mortgagee becomes adverse after the lapse of the period fixed for redemption. Ten years possession will give him a title by, ...	281.	625.
	of Judgments.	319.	685.
	does not run against the heir pending the widow's life interest.	329.	710.
	if not pleaded will not held as a bar. ...	344.	736.
PRE-EMPTION.	Right of, ...	27.	126.
	Right of, ...	60.	255.
PRESUMPTION	of payment how rebutted.	13.	66.
	of payment from lapse of time.	63.	271
	in favor of heir	87.	360
	in favor of possessor.	132.	450.
	arising from possession..	179.	517.
PREFERENCE.	Priority of creditors..	17.	87.
	Priority of mortgage over subsequent sale.	21.	107.
	Priority of deeds. Delivery.. ..	26.	124.
	Priority of creditors...	78.	322.
	Priority of mortgage over judgment... ...	103.	414.
	among creditors, Judgment. Execution...	105.	422.
	Priority of creditors.	107.	427.

		Page.	Par.
PREFERENCE	The claim of the children of a pre-deceased spouse on the property of the survivor, amounts merely to a mortgage giving them priority in respect of their share over subsequent creditors or purchasers... ...	188.	530.
	over a subsequent mortgage by mere contract. A mortgage accompanied with possession of title deeds is entitled to, ..	204.	547.
	over a prior creditor though holding a Notarial Bond. A special mortgagee is entitled to, ...	299.	652.
PRINCIPAL and AGENT.	Payment to Agent. ..	13.	65.
	Proctor's Agent.. ...	79,	329.
	Breach of Contract... ...	148.	483.
	Agent not personally liable....	149.	ib
	Agent standing security for his Principal.	152.	ib
	Stipulation by Agent for share in the profits..	156.	494.
	Special power to recover... ...	159.	501.
	Where a party appears by Attorney, the D. C. may require the presence of the party.. ...	324.	696.
PRINCIPAL and SURETY.	A creditor by discharging the principal from gaol without the consent of the surety, thereby discharges the surety... ...	193.	533.
PRIVY COUNCIL (*Vide* " APPEAL.")			
PROCTOR	acting as Deputy Fiscal..	17.	87.
	Absence of, ...	38.	169.
	neglecting his duty... ..	39.	173.
	Costs for filing two answers	42.	189.
	Absence of,, Postponement...	54.	227.
	when competent as a witness	71.	299.
	Power of D. J. over, . ..	81.	337.
	Neglect of, ...	ib	338.
	liable for neglect.	93	380.
	reporting on a pauper petition, Explanation from,	106.	424.

	Page.	Par
PROCTOR Defence *in formâ pauperis* allowed in spite of a Proctor's Certificate...	147.	479.
A,. not bound to uphold a case which he conceives to be groundless..	185.	526.
at any stage of the case provided the questions are relevant. The D, C. has discretion to allow the examination of a party or his, ...	195.	536
In a petition of appeal in which the appellant complained of the conduct of his Proctor, *held* that he had his remedy against his, ...	215.	55?
A,. when called upon to report upon a Pauper Petition is bound only to inquire into the case of the petitioner, and not to go into the possible defence of the opponent upon information obtained from him.	242.	582.
A,. when called upon to report on a Pauper petition is not bound to investigate both sides of the case.	243.	584.
to pay the batta of the witnesses. On a postponement in consequence of a Proctor's absence, the S. C. directed the, ...	295.	644.
PROCESS. Service of, ...	22.	111.
Service of,. Insufficient time	35.	155.
PROCLAMATION of 5th August 1819 against *forcible* entry, considered...	263.	613.
PROMISSORY NOTE. Payment by delivery of, ...	21.	106.
PROOF. Deft's right to insist upon legal ...	113.	434.
Burthen of., General Denial. ...	114	438.
to establish mortgage. ..	132.	451.
of marriage. ...	162.	504.
of a Bond. Attesting witnesses. Comparison of handwriting. ...	177.	515.
of a Bond. Minor discrepancies &c. ..	178.	516.
of an interest in land. ...	179.	517.
; yet the rule is open to exception whenever the deed is of a suspicious nature. Though as a general rule deeds of thirty years standing do not require, ...	246.	586

	Page,	Par.
PROPERTY. Concealment of,. Suit *in forma pauperis* ..	23.	112.
in suit, now ascertained. Value of the, ...	74.	308.
A sudden change in the course of a river where land is transferred from one bank to the opposite does not alter the, ..	184.	525.
PROVISIONAL JUDGMENT. (*Vide* "NAMPTISSEMENT.")		
PROXY. The., of one of several partners is sufficient to authorize an action. ...	240.	578.
PUNISHMENT for frivolous litigation. ...	174.	513.
PURCHASE (*Vide* "VENDOR AND PURCHASE.")		
RAJEKARIA.	7.	40.
RATNAPOORA. Custom of,. in respect of *Nille* tenure ...	147.	477.
RECONVENTION. Cross-action. ..	11.	56.
... .	106.	425.
RECEIPT without stamp. ...	27.	127.
Money paid without, ..	41.	181.
The., for the deliveries not being negotiable, the Deft was held bound not to produce them on demanding payment. ...	228.	563.
RECOVERY of money paid. ...	82.	342.
RE-ENTRY how enforced. Right of, ...	75.	313.
REGISTRAR's fee for reporting on a Bill of Costs. ...	148.	482.
REJECTION of Evidence. A D. J. is bound to record reasons for, ...	143.	472.
RELIEF. Judicial and Sovereign. ..	18.	91.
Further., Prayer for, ..	91.	373.
Further., Prayer for,. Several claims in the same suit. Costs. ...	102.	411.
Appeal after lapse of time. ..	46. (ft-note)	
Further,. Prayer for,. Claim of a specific sum. Subsequent arrears. ..	113.	433.
General,. A Court cannot award more damages than is claimed in the absence of a prayer for, ..	140.	463.
REMISSION of rent. Where a Govt. renter deprived himself of a right of, ..	205.	548.
REPLICATION (*Vide* "PLEADINGS.")		

	Page.	Par.
Res-Judicata.	7.	36.
... .	10.	53.
... .	25.	119.
... .	26.	123.
... .	46.	201.
.. ..	82.	345.
.. ..	84.	350.
... ...	98.	399.
Dismissal after evidence heard.	104.	420.
Effect of an order for rehearing. ...	134.	454.
in the absence of appeal. ...	141.	468.
Prescriptive possession of Service Parveny lands.	166.	509.
Collusion between parties. ...	183.	523.
Identity of Parties and Rights. ...	313.	674.
Parties and Privies. ..	314.	675.
.. ..	344.	736.
Resumption Right of,. (*Vide* "Vendor and Purchaser")		
Re-Sale (*Vide* "Vendor and Purchaser.")		
Restitutio in integrum ..	82.	345.
Revenue Paddy. Remuneration. ..	8.	44.
Law. Infraction of, ...	69.	289.
Reversal of a decree on contradictory evidence and possession proved, though not pleaded... ...	80.	333.
Revivor of a suit abated by death of a party. Fresh action without revivor. Costs... ..	113.	435.
of a judgment by a *Rule Nisi*... ..	193.	531.
Right of a grandson during father's life-time to a prescriptive title acquired by his grandfather... ...	82.	343.
of a party who asweddumizes another's lands with his assent...	199.	538.
of abating obstructions.. ..	305.	661.
to cut down over-hanging branches is a Common Law right.. ..	326.	701.

	Page.	Par.
RULES AND ORDERS.. ...	77.	321.
Further evidence under *Rule* 24 *Sect.* 1.	143.	474.
The D. C. if it proceeds under *Rule* 11. of *Sect* 1. cannot admit the evidence of a witness to contradict the statement of a party	235.	568.
RULE NISI (*Vide* " REVIVOR")		
RULE (*Vide* " CIRCULAR LETTER,")		
SALE. Conditions of, ...	16.	84.
Priority of mortgage over subsequent, ..	21.	107.
Non-Opposition at a, ...	37.	165.
of land. Assent to a, ...	54.	229.
of immoveable property.. ..	88.	366.
of more than vendor is entitled to... ..	104.	419.
granted by the S. C. Injunction against a, ..	142.	471.
of the mortgage is not thereby discharged. A surety, who after notice, does not object to the, ..	193.	533.
in Execution how established in evidence. A, ..	226.	561.
Proof of no publication of, ...	261.	611.
SEPARATION. (*Vide* " HUSBAND AND WIFE.")		
SERVICE. Notice of, ..	14.	68.
of Process. Form of returns... ...	22.	111.
of a Notice in English on a Cingalese party is not " *due notice*." ..	341.	731.
SERVICES. Royal Village... ...	146.	476.
SENTENCE cannot be altered. A, ...	17.	90.
SEAMEN engaging for the whole voyage... ...	30.	137.
Parole engagement of, ..	*ib*	*ib*
SEQUESTRATION. Waiver of, ...	39.	177.
Costs,. ..	46.	202.
Purchase in ignorance of,. Division of Costs... ...	94.	384.
cannot be issued into other Districts ...	112.	431.
Security in appeal dispensed with where the property sequestered is sufficient to cover the judgment and costs. ...	307.	666.

	Page.	Par
SEQUESTRATION. Where the property sequestered is sufficient to cover the judgment and costs no security will be required in Appeal... ..	330.	712.
SERVANT. (*Vide* " MASTER AND SERVANT.")		
SECURITY for Costs. (*Vide* "COSTS")		
in Appeal (*Vide* " APPEAL.")		
Appraisement of property tendered as, ...	157.	497
SECOND marriage (*Vide* " MARRIAGE")		
SERVANT'S wages (*Vide* " PRESCRIPTION.")		
SECRETARY. (*Vide* " EVIDENCE" and " ADMINISTRATION.")		
SETT-OFF of a debt due by A. against a claim of B. who admitted that A. was partly interested in the claim... .	106.	425.
SEDUCTION. Parent becoming a party to child's marriage contract. Remedy of Husband in case of, ...	210.	549.
SHROFF. (*Vide* "PAYMENT,")		
SPECIFIC PERFORMANCE, Claim of,. when prescribed ...	145.	475
SPECIALITY (*Vide* " EVIDENCE")		
STAMP on an instrument having two-fold operation. ..	11.	55.
Money. ...	18.	94.
Wrong class. ...	19.	100.
Agreement to marry. Penalty. ..	20.	102.
Registry of *Cartoms*. ...	40.	178
Cartom. ..	56.	237.
necessary if a contract is reduced to writing. ..	57.	242.
Merchant's Account. ...	61.	260.
Written acknowledgment of a balance. ...	70.	293.
duty. ...	73.	307.
A deed is void for want of proper, ...	95.	391
Marriage contract. ...	97.	398.
The Court is bound to receive a document wherever the Stamp may have been purchased from. ...	169.	510.
how supplied. Deficiency of, ...	296.	646

	Page.	Par.
STATUTE of FRAUDS. A contract for the sale of *growing* timber must be in writing. ...	304.	659.
STALE WRITS. Presumption of payment. ...	340.	728.
STRIKING off a case. *(Vide* " CASE."*)*		
SUBPŒNAS. Conditions imposed upon issuing. ...	297.	647.
SUCCESSION. Right of, ...	67.	285.
to Temple Property. ..	332.	719.
SUITS. Order for consolidation of, ...	131.	447.
SUPREME COURT how far entitled to interfere with decrees.	67.	284.
cannot alter its own decree. ...	86.	358.
Constitution of, ...	135.	457.
will not alter a judgment where the party aggrieved has not appealed. The, ...	202.	543.
has succeeded to the powers of the *Wees-kamer*. The. ...	279.	623.
SUPERANNUATED Judgment. *(Vide* " REVIVOR."*)*		
SURVIVOR *(Vide* " CHILDREN"*)*		
SURETY who after notice does not object to the sale of the mortgage is not thereby discharged. A,	193.	533.
A creditor by discharging the principal from gaol, without the consent of the surety, thereby discharges the, ..	*ib*	*ib*
paying the debt, is entitled to stand in the place of the creditor. A, ..	255.	599.
Where Sureties have been illegally proceeded against their remedy is by action. .	328.	709
SUSPICIONS against Plt's title. ...	96.	392.
SURVEY at any time after the list of witnesses has been filed, The Court may order a, ...	286.	686.
TEMPLE Property. ...	32.	146.
Action against a late Officer of a, ...	36.	159.
Stamp duty. Exemption in favor of, ...	73.	307.
property. Succession to, ...	332.	719.
TENDER. Costs. ...	31.	143.
Claim not tendered. Costs. ...	37.	166.
Admission with,. Costs. ...	92.	373.

		Page.	Par.
TENANT. (*Vide* "LANDLORD AND TENANT.")			
TENURE. *Nille*,. (*Vide* "RATNAPCORA.")			
THESEWELLEME.			
Dowry property not liable to husband's debts.	..	24.	115.
By the Law of Jaffna a son is not liable for his father's debts, unless the latter has left property, and the son bas taken possession thereof.	..	264.	614.
Jaffna Customs. A woman attains majority at 13, and may marry without the parents consent. If forcibly abducted the father may sue..		301.	655.
TITLE to land. *Primâ facie*,	...	13.	64
to sue pleaded, but not proved.	...	21.	105.
of Plt. Trespass.	...	56.	238.
under a Fiscal's Sale.	...	73.	325.
. Possession. Acknowledgment of,	...	79.	326.
Prescriptive,. (*Vide* "PRESCRIPTION.")			
. Possession. Presumption in favor of heir. Acknowledgment of,	...	87.	360.
Suspicions against Plt's.	..	96.	392.
by prescription. (*Vide* "ADVERSE" title)			
TRADESMEN'S Books. Evidence.	..	156.	496.
TRANSFER of Cases.	...	16.	160.
of a mere building erected on Govt. land.	...	55.	231.
of a case where the judge is a party.	...	71.	297.
of cases on establishment of new Courts.	..	92.	374.
of a cause instituted in a wrong Court.	...	*ib*	375.
of land. Waiver of agreement for,	...	143.	475.
Possession of the property agreed to be transferred.	...	145.	*ib*
of a cause on the ground of improper proceedings of a D. J.	...	164.	507.
and consolidation of several suits. Order for,	..	191.	530.
Grounds for transferring a suit from one D. C. to another.	..	336.	723.

	Page.	Par.
Trespass. Title of Plt.	56.	238.
Joint and several liability of Defts.	92.	377.
In,. where a Deft sets up the title of a third party, the Court is not bound to make him a party, unless he chooses to intervene.	284.	632.
In,. to goods, direct proof of the taking is not essential. Justification. Costs in the original class. ...	310.	672.
Trial. Objections during,. Appeal.	44.	196.
pending interlocutory Appeal.	96.	396
Roll. Power to advance cases on the,	342.	733
Triple Costs. (*Vide* "Costs.")		
Trustee. A,. for the recovery of debts is liable for negligence. ...	315.	677.
Variance of Bond.	25.	116.
Libel.	38.	171.
claim founded on a sale and possession.	73.	305.
in respect of the expressions used in an action of defamation.	93.	379.
...	339.	726.
Vendor and Purchaser. Remedy of Purchaser in the purchase of mortgaged property.	21.	107.
Overplus upon re-sale.	22.	109.
Plt's Vendor.	28.	128.
Completion of transfer. Payment of money.	52.	221.
Duty of Purchaser.	62.	266.
Waiver of the Right of Resumption on non-payment of purchase money.	66.	281
Right of re-sale on default of purchaser.	74.	311.
Purchase in ignorance of sequestration.	94.	384.
Sale of more than vendor is entitled to,.	104.	419

	Page.	Par.
VENDOR AND PURCHASER. An action does not lie for the whole of the purchase money, where the Vendor has exercised his right of reselling... ...	305.	662.
VERBAL BEQUEST. (*Vide* "BEQUEST." and "HEIRS")		
VEXATIOUS Appeal. Costs.	3.	11.
action by pauper. — —	106.	424.
. Appeal. Fine for, — —	132.	449.
Appeal. Fine for, — —	136.	459.
Vow of poverty does not excuse the performance of duties undertaken. — ..	*ib*	458.
VOYAGE. Proof of damage during, ...	78.	323.
WAIVER of sequestration ... — —	39.	177.
of the right of resumption. (*Vide* VENDOR and PURCHASER.)		
of one of the grounds of action—	111.	429.
of a plea to the jurisdiction. — ...	112.	432.
of agreement &c. (*Vide* "AGREEMENT.")		
of the contract. Alleged, — —	151.	483.
WIDOW. (*Vide* "ADMINISTRATION.")		
WIFE. (*Vide* "HUSBAND and WIFE)		
WILL. Foreign, ...	35.	156.
where the parties have for several years put their own construction on it, the Court will not disrurb it. On a doubtful clause of a, ...	217.	554.
WITNESSES. Witness to a deed. ... —	5.	26.
Acquittal from perjury. — ...	6.	27.
Credit due to, ...	12.	58.
Absence of, ...	*ib.*	104.
Plea of ignorance for not having summoned.	33.	149.
Expences of, — ... —	37.	167.
necessary. Personal delivery of List of, ...	44.	194.
When Court bound to hear, ... —	56.	235.
Postponement on account of the absence of material, ... —	69.	291.

		Page.	Par
WITNESSES.	Proctor when competent as a witness. ...	71.	299.
	Interpreter of a Court as a witness.. ..	72.	300.
	Evidence to discredit a witness..	ib	301.
	Absence of, ...	84.	352.
	Witness convicted of Perjury. Proof.. ...	88.	365.
	Admissions made as a witness in a former case..	96.	394.
	Objection to a witness.	100.	404.
	Witness convicted of Perjury. Proof.. ...	105.	421.
	Attesting,. Proof of a Bond. Handwriting ..	177.	515.
	before the S. C. Form of an order for the examination of, ...	214.	551.
	The D. C. if it proceeds under *Rule* 11 *of Sect* I. connot admit the evidence of a witness to contradict the statement of a party.	235.	568.
	the Court will in view of the customs of the Country respect their feelings. In directing the attendance of Parties and, ...	238.	575.
	were tampered with. Appeal on the ground that the Appellant's, ...	283,	629.
	The Court cannot non-suit a Plt merely because he has not *summoned* certain, ...	287.	639.
	A witness may be called and examined though not summoned.	ib	ib
	On a postponement in consequence of a Proctor's absence, the S. C. directed the Proctor to pay the batta of the, ...	295.	644.
	though not on the List ; and may call witnesses at its own instance. The D. C. may hear, ..	305.	662.
	does not dispense with legal proof, The death of all the attesting, ...	306.	663.
	living 4 miles of the Court not entitled to Batta.	328.	708.
	not on the List. Examination of, ...	342.	732.

		Page.	Par
Work and Labour.	In an action for work and labour where the Deft pleaded a written agreement, and that one of the conditions thereof had been broken by the Plt, but refused to prodhed up Agreement, the Court entered up judgment for Plt.	... 240.	579.
Written Aoreement. (*Vide* " Agreement")			
Writs.	Stale,, Presumption of payment.	... 340.	728